COLLECTING FROM SOVEREIGNS: THE CURRENT LEGAL FRAMEWORK FOR ENFORCING ARBITRAL AWARDS AND COURT JUDGMENTS AGAINST STATES AND THEIR INSTRUMENTALITIES, AND SOME PROPOSALS FOR ITS REFORM

George K. Foster

ABSTRACT

This article provides an overview of the current international legal framework for the enforcement of arbitral awards and court judgments against sovereign States and their instrumentalities, examines the policy rationales on which that framework is based, and offers proposals for its reform. Part I highlights the importance of having an effective enforcement framework in light of the growing frequency with which private companies and individuals are doing business or otherwise interacting with sovereigns. Part II summarizes the steps required for a private creditor to enforce a ruling against a sovereign—including identifying non-immune assets, domesticating the ruling in countries where assets are located, and attaching and executing against assets—and explores the doctrine of sovereign immunity and other unique complications that often arise in enforcement proceedings against sovereigns. Part III identifies the policy rationales that have been cited by courts and commentators in support of the current parameters of sovereign immunity, and considers the extent to which these are supportable. Part III also sets forth proposed adjustments to the sovereign immunity doctrine as it is presently formulated in the United States, which are intended to provide creditors with more reliable prospects for enforcing valid debts, without giving rise to the adverse consequences that the doctrine is designed to avoid. In addition, the author proposes an international convention that would establish an alternative to judicial enforcement in certain cases, permitting creditors to collect via a surety mechanism funded with contributions from participating States.

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George K. Foster[1]

I. INTRODUCTION

If sovereign States and their agencies and instrumentalities are to be accountable for their actions toward private parties, there must be mechanisms in place not only for adjudicating legal claims against them, but also for enforcing the arbitral awards and court judgments that arise from those proceedings. Unfortunately, however, the current international legal framework for the enforcement of awards and judgments against sovereigns[2] is far from adequate. It is notoriously difficult to navigate, and many private creditors who are owed valid debts by sovereigns, and who secure rulings in their favor, are frustrated in their efforts to collect.

A number of obstacles stand in the way of enforcement. In some countries, the courts are not sufficiently independent to enforce awards or judgments against the State of which they are a part. In addition, many sovereigns do not maintain large holdings of property outside their own borders, and, when they do so, these assets are often held indirectly via corporate instrumentalities that have distinct legal personalities. Moreover, enforcement requires the cooperation of the judicial organs of the States where the debtor sovereign's overseas assets are located, and States have long been cautious about taking coercive measures against properties of fellow States and their agencies and instrumentalities. Courts will generally take such measures only under narrow circumstances; if those are not present, the debtor sovereign's property is treated as "immune," and its creditors are without recourse.

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2. The term "sovereign," when used in this article as a noun, refers generally to any sovereign entity, whether a State or a State entity.

The difficulties faced by creditors in this regard are a matter of growing significance in light of globalization and the increasing frequency with which companies and individuals are doing business and traveling abroad. While disputes against foreign sovereigns may once have been largely the concern of multinational corporations, there is now a much broader range of persons interacting with foreign sovereigns. In the United States alone, there have been more than 200 reported court cases filed against foreign sovereigns since 2004.[3] The underlying disputes have arisen from alleged conduct ranging from breaches of joint venture agreements,[4] to defaults on sovereign debt,[5] to expropriations of property,[6] to State sponsorship of terrorism,[7] to human trafficking.[8] The parties seeking redress have included not only well-heeled corporations, but also individuals of modest means, such as Holocaust survivors,[9] relatives of terrorist bombing victims,[10] and domestic servants.[11] Yet, if history is any guide, few of these parties will succeed in enforcing any judgments they may obtain.

Despite the obstacles to collecting from a sovereign, success can be obtainable for a private creditor if the creditor is willing and able to commit substantial resources to the effort and takes the right steps toward collection. Part II of this article outlines the procedural steps a private creditor is generally required to take in order to enforce an award or judgment against a sovereign, and the unique complications that typically arise in cases of this nature. Part III offers reflections on the policy considerations that are implicated by enforcement against sovereigns, and proposes adjustments to the current legal framework that are designed to strike a better balance of those considerations and to provide creditors with more reliable prospects for enforcing valid debts.

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3. This figure includes cases that were filed in the first instance in U.S. courts, as well as cases brought to confirm arbitral awards or foreign court judgments. Notably, however, this figure includes only cases that have resulted in decisions available on the Lexis-Nexis database. There have likely been other cases against sovereigns during this timeframe, as not all proceedings filed in U.S. courts result in publicly-available opinions.

4. *See, e.g.*, Bridas S.A.P.I.C. v. Gov't of Turkm., 447 F.3d 411 (5th Cir. 2006).

5. *See, e.g.*, EM Ltd. v. Republic of Argentina, 473 F.3d 463 (2d Cir. 2007).

6. *See, e.g.*, Garb v. Republic of Poland, 440 F.3d 579 (2d Cir. 2006).

7. *See, e.g.*, Bennett v. Islamic Republic of Iran, 507 F. Supp. 2d 117 (D.D.C. 2007).

8. *See, e.g.*, Sabbithi v. Al Saleh, Case No. 07-CV-00115-EGS (D.D.C. filed Jan. 17, 2007).

9. *See Garb*, 440 F.3d at 581–582.

10. *See Bennett*, 507 F. Supp. 2d at 121–124.

11. *See Sabbithi*, Case No. 07-CV-00115-EGS.

II. THE STEPS REQUIRED TO ENFORCE AN AWARD OR JUDGMENT AGAINST A SOVEREIGN

If a creditor has obtained an award or judgment against a sovereign, and the sovereign refuses to honor it, the creditor must seek recourse through judicial enforcement measures. In that event, the possibility of pursuing enforcement in the sovereign's home territory should be considered. Local courts may lack the independence required to enforce a debt against the State, or this option may be impracticable for other reasons, but, nonetheless, the possibility should at least be explored.

If that is not a viable option, generally it will be necessary to conduct an international asset search designed to identify property of the sovereign outside of its home territory, coupled with an investigation into the availability of such property under the law of the country where it is located. This should narrow the list of countries where it is appropriate to initiate enforcement proceedings. The creditor will then need to commence proceedings in countries where any such assets have been located to have the ruling confirmed or recognized—a process sometimes referred to as "domestication" of the ruling—before ultimately attaching and executing on any non-immune assets that have been located.

The sections that follow will explore each of these steps in greater detail, with particular attention given to how these steps are likely to play out in the United States. This approach will be followed for two reasons. First, the United States is the country in which the author practices, and with whose law he has the greatest familiarity. Second, enforcement in the United States should be considered in almost any case, because there is a large volume of commercial activity in the United States and sovereigns frequently hold property there.

A. Prelude to Enforcement: Exploring Options for Voluntary Compliance

Sovereigns' reactions to adverse rulings vary. Some may denounce any such ruling and vow to resist compliance, while others may simply write a check. In most cases, however, the response will fall somewhere in between. Oftentimes, officials will express a desire to pay the debt, but the creditor is left waiting in vain for payment to be made. This is common in part because, in many countries, there is often no precise allocation of responsibility for such matters within the government, and so it is not clear whose approval needs to be obtained for payment to be processed. The debt may also need to be appropriated in the national budget, requiring approval of the legislature, and there is often ample opportunity for such a budget measure to be stalled or blocked. Officials may also be concerned about the public's reaction to a decision to satisfy the debt, particularly where officials have denounced the creditor's claims in the press. And, of course, the sovereign may face economic constraints on its ability to pay the debt. Under any of these circumstances, it is hard for officials to resist the temptation to delay payment long enough to leave the debt to a successor administration.

It is therefore often worthwhile for the creditor to explore creative payment options with the sovereign if its officials do express an interest in satisfying the debt. Such options might include an installment plan, the issuance of bonds by the State that can be sold by the creditor on the secondary market, the assignment of a quantity of oil or other commodity with an ascertainable market value, or some combination of these options. Such solutions may be more palatable and practicable to the sovereign than a lump sum payment.

If payment terms are agreed upon, the creditor is generally well-advised to avoid having any settlement agreement supersede the award or judgment without obtaining adequate security for the sovereign's obligations, or making payment-in-full a condition precedent to the agreement's effectiveness. Otherwise the creditor may end up having to bring a new proceeding on the settlement agreement just to get back to its prior position of having an operative ruling in its favor. Any such agreement should also—for reasons discussed subsequently in this article—contain the broadest possible waivers of sovereign immunity.[12]

While it may make sense to explore payment options in this manner after a ruling on the underlying debt has been obtained, oftentimes the only way the creditor will be able to induce the sovereign to agree to acceptable payment terms will be to pursue enforcement aggressively. If, however, the creditor does desire to communicate with the sovereign at any point, discussions can sometimes be facilitated by diplomatic authorities. Diplomatic authorities may be able to assist in identifying the officials in a foreign State with the power to authorize payment and arrange meetings with them. In fact, in appropriate cases, the creditor's government may even bring some pressure to bear on the debtor State. The U.S. Government, for example, will, under some circumstances, withdraw financial assistance[13] or trade preferences[14] from a State that has repudiated a valid debt to a U.S. person. Accordingly, creditors often find it worthwhile to bring their plight to the attention of diplomatic authorities and elicit their support.

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12. *See infra* Parts II.C and II.D.3.a.i.

13. Legislation in the United States known as the Helms Amendment directs the President to: (1) withhold financial assistance under certain aid programs to countries that have expropriated or repudiated contracts with American-owned properties abroad without adequate compensation; and (2) instruct the U.S. Executive Director of various multilateral development banks and international financial institutions to vote against any new loans or other financial aid to such countries, subject to the right of the President to waive such sanctions in the national interest. *See* 22 U.S.C. §§ 283r, 2370a (2006).

14. Trade preferences are extended to certain developing countries under a program known as the Generalized System of Preferences ("GSP"). These can be withdrawn for various reasons, including, *inter alia*, where a State has expropriated property of a U.S. person or repudiated a contract with a U.S. person. *See* 19 U.S.C. § 2462(b)(2) (2006).

B. The Possibility of Enforcement in the Sovereign's Own Courts

If the sovereign is *not* willing to satisfy the debt, one step the creditor generally should consider is pursuing enforcement in the sovereign's own courts. This may not be feasible if those courts lack the necessary independence, if legislation or judicial precedent makes it apparent that enforcement will not be permitted, or if enforcement proceedings would require payment of prohibitively high court fees. This option should at least be considered, though, because the sovereign's home territory is the one place where it is sure to have assets, and the courts of some countries *can* be counted upon to enforce rulings against public entities.

Moreover, even if the law of the debtor State precludes execution against assets of the State or other public entities, there may be an alternative mechanism for a creditor to recover on a judgment. In Brazil and Argentina, for example, awards or judgments against public entities are sometimes satisfied via special legal mechanisms that provide for periodic budgetary appropriations or other payments to satisfy debts.[15] Yet, even such alternative mechanisms require a local court to affirm the debt, as well as some will on the part of the sovereign to honor the debt, so pursuing these avenues may be just as impracticable as a more conventional enforcement regime.

If the debtor State's courts refuse to enforce a ruling in favor of an alien, or if local enforcement is rendered impracticable by legislation, adverse precedent, or other barriers, this may give rise to a new claim under international law. Specifically, such circumstances may constitute a "denial of justice," or may otherwise be cognizable under an investment treaty, many of which authorize investors to bring arbitration claims against host States.[16] It might be worth

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15. *See, e.g.*, FABIO AKIRA HASHIZUME & JULIO CALLEGARI, JP MORGAN SECURITIES INC., BRAZIL: A PRIMER ON PRECATORIOS (2007) (on file with author) (explaining the nature of *precatórios*, which function as tradable securities but are, in fact, orders issued by a Brazilian court directing a public entity to make periodic payments on a debt); Osvaldo J. Marzorati, *Enforcement of Treaty Awards and National Constitutions (the Argentinian Cases)*, 7 BUS. L. INT'L 226, 234–235 (2006) (describing the Argentine system for obtaining satisfaction on a judgment against the State via periodic appropriations from the national budget).

16. *See* Don Wallace, Jr., *Fair and Equitable Treatment and Denial of Justice:* Loewen v. US *and* Chattin v. Mexico, *in* INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 669, 675–677, 693–696 (Todd Weiler ed., 2005) (asserting that a denial of justice by a national court, or legislation making a judicial failure inevitable, violates the "fair and equitable treatment" obligation that is set forth in many investment treaties). *See*

pursuing such a secondary claim if the arbitral award that could be obtained would have superior prospects for enforcement as compared to the ruling in hand. Advantages of arbitral awards at the enforcement stage—and of certain types of awards in particular—are discussed *infra* Part II.D.

C. Identifying Attachable Assets of the Sovereign Outside Its Home Territory

If the sovereign is not willing to satisfy the award, and enforcement in its home territory is not feasible, the creditor will have to proceed elsewhere. Deciding where to initiate enforcement proceedings requires a sense of where the sovereign is most likely to have attachable assets, or to acquire them in the future. When searching for such assets, it is important to focus on assets that are reachable under the law of the country where they are located. There is no point spending time and money identifying assets that are exempt from execution.

Whether an asset will be reachable generally turns on: (a) whether the asset is protected by the doctrine of sovereign immunity under the law of the relevant jurisdiction; and (b) whether it may properly be treated as property of the debtor sovereign. Although the concept of sovereign immunity is widely considered a matter of customary public international law—with all States recognizing some limitation on the extent to which other States and their property may be subjected to jurisdiction or attachment in local courts—the practice of States in this regard has been inconsistent.[17] Concepts of ownership also vary from country to country, as do the legal doctrines that may permit a court to disregard the separate legal personality of an affiliated entity and treat the entity's assets as those of the debtor.

The subsections that follow consider how these issues, relevant to the "attachability" of assets, are approached in three prominent countries—the United States, the United Kingdom, and France—as well as under a proposed United

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generally JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 6 (2005). Arbitration under investment treaties is discussed in further detail *infra* Part II.D.2.

17. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 325–330 (6th ed. 2003) ("Recent writers emphasize that there is a trend in the practice of states [with regard to sovereign immunity] but avoid firm and precise prescriptions as to the present state of the law. Moreover, the practice of states is far from consistent . . . ."); *see generally* A.N. Yiannopoulos, *Foreign Sovereign Immunity and the Arrest of State-Owned Ships: The Need for an Admiralty Foreign Sovereign Immunity Act*, 57 TUL. L. REV. 1274, 1275 (1983) ("According to one view, the members of the international community are bound by customary public international law to accord immunity to foreign sovereigns because of their equality and independence . . . . According to another view, foreign sovereign immunity is founded on comity. In the absence of an international treaty, members of the international community are in no way bound to accord immunity to a foreign sovereign; if they do so, it is by virtue of internal rules of law.").

Nations Convention on the Jurisdictional Immunities of States and their Property ("UN Convention").[18]

1. Attachability of Assets in the United States

In the United States, court proceedings against foreign sovereigns are governed by the Foreign Sovereign Immunities Act of 1976 ("FSIA").[19] This statute sets forth the limited circumstances under which assets of a foreign sovereign may be denied immunity. A creditor seeking to enforce an award or judgment must satisfy the requirements of the FSIA, and must also establish that the assets that it seeks to attach or seize are owned or controlled by the debtor sovereign.

a. Immunity from Attachment and Execution

Section 1609 of the FSIA provides that "a foreign state shall be immune from attachment arrest and execution except as provided in §§ 1610 and 1611 of this chapter."[20] Section 1610 then establishes a threshold requirement that, before property of a sovereign may be denied immunity, there must be some connection between either the debtor, or its property, and a "commercial activity in the United States."[21] Specifically, if the property is owned by a foreign State, then the property may potentially be denied immunity only if the property itself is used for such a commercial activity.[22] In contrast, if the property belongs to an agency or instrumentality, it may potentially be denied immunity if the agency or instrumentality is engaged in commercial activity in the United States, whether or not the property itself is used for such activity.[23] In other words, once it has been established that the agency or instrumentality is engaged in a commercial activity in the United States, the entire universe of its local assets is potentially reachable, regardless of the uses to which they have been put.[24] This discrepancy is intended

18. G.A. Res. 59/38, Annex, U.N. Doc. A/RES/59/38/Annex (Dec. 2, 2004) [hereinafter UN Convention] (adopted without a vote).

19. Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1602–1611 (2006)).

20. 28 U.S.C. § 1609 (2006). "Foreign state" is defined in § 1603(a) to include both the State and any "agency or instrumentality" thereof. *See id.* § 1603(a).

21. *See id.* § 1610(a)-(b).

22. *See id.* § 1610(a).

23. *See id.* § 1610(b).

24. *See* EM Ltd. v. Republic of Argentina, 473 F.3d 463, 472–473 (2d Cir. 2007) ("Under subsections 1610(a) and (d), assets of a foreign state can be attached only if the

to reflect a fundamental difference between States and their commercial entities. Whereas the primary function of States is to perform governmental functions, State-owned entities engaged in commercial activities are largely indistinguishable from private companies.[25]

Section 1611, in turn, provides additional protection to certain particularly sensitive types of property.[26]

The following sections consider how courts have interpreted the term "commercial activity" under the FSIA, as well as certain additional requirements that must be established, beyond the "commercial activity" requirement, before property may be denied immunity.

i. The Meaning of "Commercial Activity"

Section 1603(d) defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act."[27] It provides that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."[28]

The U.S. Supreme Court has elaborated upon the standard as follows:

> [W]hen a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are "commercial" within the meaning of the FSIA. Moreover, because the Act provides that the commercial

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assets sought to be attached are 'used for a commercial activity in the United States.' But under subsection 1610(b), which concerns agencies and instrumentalities of foreign states, creditors may attach '*any* property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States,' 28 U.S.C. § 1610(b)." (first and third emphases omitted)); Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 313 F.3d 70, 82 (2d Cir. 2002) ("Section 1610 provides different regimes for sovereign states on the one hand, and their agencies and instrumentalities on the other. . . . Subsection (a) is generally thought to be narrower than subsection (b).").

25. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 460 cmt. b (1987) ("These distinctions reflect the premise that state instrumentalities engaged in commercial activities are akin to commercial enterprises, so that immunity is exceptional and limited, whereas the primary function of states is government and, absent waiver, their liability should be limited to particular claims and their amenability to post-judgment attachment should be limited to particular property.").

26. *See* 28 U.S.C. § 1611.

27. *Id.* § 1603(d).

28. *Id.*

> character of an act is to be determined by reference to its "nature" rather than its "purpose," the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in "trade and traffic or commerce."[29]

In addition, the legislative history of the FSIA emphasizes that:

> [T]he fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical. Thus, a contract by a foreign government to buy provisions or equipment for its armed forces or to construct a government building constitutes a commercial activity. The same would be true of a contract to make repairs on an embassy building. Such contracts should be considered to be commercial contracts, even if their ultimate object is to further a public function.[30]

Conduct that has been held to constitute commercial activity in the United States includes a State's issuance of bonds to U.S. investors,[31] a national space agency's obtaining and assertion of U.S. patents,[32] a national airline's sale of tickets to U.S. passengers,[33] a defense ministry's purchase of military supplies,[34] a State art gallery's publication of books and advertising of exhibitions in the United States,[35] a State commission's entry into a contract with a U.S. company for the sale of an

29. Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614 (1992) (citation omitted).

30. H.R. REP. NO. 94-1487, at 16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6615.

31. *See Weltover, Inc.*, 504 U.S. at 615–617.

32. *See* Intel Corp. v. Commonwealth Scientific & Indus. Research Org., 455 F.3d 1364, 1364 (Fed. Cir. 2006).

33. *See* Kirkham v. Société Air Fr., 429 F.3d 288, 293 (D.C. Cir. 2005).

34. *See* Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran v. Cubic Def. Sys., Inc., 385 F.3d 1206, 1219–1220 (9th Cir. 2004), *rev'd on other grounds*, 546 U.S. 450 (2006).

35. *See* Altmann v. Republic of Austria, 317 F.3d 954, 968–969 (9th Cir. 2002).

aircraft,[36] and a State instrumentality's sale of spices to, and purchase of supplies from, U.S. companies.[37]

Conduct that has been held *not* to constitute commercial activity in the United States includes a State's repayment of a loan to the IMF,[38] a provincial government's expropriation of a finance company's stake in a local company,[39] a State's expropriation of property of Jewish refugees in the wake of World War II,[40] a Ministry of Agriculture's issuance of a license for the export of rhesus monkeys to a U.S. company,[41] and a State's imposition of taxes on an airline.[42]

ii. Additional Requirements

For property of a sovereign to be denied immunity, at least one of a number of additional enumerated conditions (sometimes referred to as "exceptions") must be met, beyond the threshold commercial activity requirement.[43] These conditions vary with the nature of the sovereign.

1. Exceptions Applicable to Foreign States

Section 1610(a) sets forth several exceptions to immunity for property of foreign States.

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36. *See* Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines, 965 F.2d 1375, 1386 (5th Cir. 1992).

37. *See* Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia, 616 F. Supp. 660, 664 (W.D. Mich. 1985).

38. *See* EM Ltd. v. Republic of Argentina, 473 F.3d 463, 482 (2d Cir. 2007).

39. *See* Yang Rong v. Liaoning Provincial Gov't, 452 F.3d 883, 890 (D.C. Cir. 2006).

40. *See* Garb v. Republic of Poland, 440 F.3d 579, 586–87 (2d Cir. 2006).

41. *See* MOL, Inc. v. People's Republic of Bangladesh, 736 F.2d 1326, 1329 (9th Cir. 1984).

42. *See* LNC Invs., Inc. v. Republic of Nicaragua, 96 Civ. 6360 (JFK), 2000 U.S. Dist. LEXIS 7814, at *16–17 (S.D.N.Y. June 8, 2000), *aff'd*, 228 F.3d 423 (2d Cir. 2000).

43. As previously discussed, the threshold "commercial activity" requirement is set forth in §§ 1610(a) and 1610(b). *See* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1610(a) (2006) ("The property in the United States of a foreign state . . . *used for a commercial activity in the United States*, shall not be immune from attachment in aid of execution, or from execution, . . . if" one or more specified exceptions is satisfied (emphasis added)); *id.* § 1610(b) ("[A]ny property in the United States of an agency or instrumentality of a foreign state engaged in *commercial activity in the United States* shall not be immune from attachment in aid of execution, or from execution, . . . if" one or more specified exceptions is satisfied (emphasis added)).

One exception, known as the "waiver" exception, applies where "the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication."[44] Explicit waivers are often found in a contract between the sovereign and the creditor that predates the dispute. Such a waiver can be of great value at the enforcement stage, should a dispute ever arise, so it is always good practice for an investor to seek to include such a provision when negotiating a contract with a foreign sovereign.[45]

If no such waiver has been made, the creditor may need to rely on the "commercial activity" exception, which applies where the property "is or was used for the commercial activity upon which the claim is based."[46] This exception should not be confused with the threshold requirement that the property be "used for a commercial activity in the United States."[47] To satisfy this exception, the property must be used with the *specific* activity that gave rise to the debt. This would exclude, for example, property of the State used in an agricultural enterprise, where the debt at issue arose from an unrelated contract for the construction of a cement factory.

Another exception applies where the judgment "is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement."[48] In other words, if an award has been confirmed by a U.S. court, then the creditor may attach *any* property of the debtor in use for a commercial activity in the United States, whether or not it is connected with the activity upon which the claim is based. Accordingly, in the previous example, a creditor could seize property associated with the State's agricultural enterprise, even if the debt arose from an unrelated construction project. This confers a distinct advantage on arbitration vis-à-vis court litigation, and weighs in favor of opting for arbitration in contracts with a sovereign.

Other exceptions of § 1610(a) apply where:

- "the execution relates to a judgment establishing rights in property . . . taken in violation of international law" or exchanged for such property;[49]

44. *Id.* § 1610(a)(1).

45. Any such waiver should be drafted to extend to all types of immunity, including immunity from jurisdiction (in any proceeding, whether on the merits of the underlying claim or in a proceeding to recognize and enforce an arbitral award or court judgment relating to the contract), as well as immunity from pre-judgment attachment and post-judgment attachment and execution.

46. 28 U.S.C. § 1610(a)(2).

47. *See id.* § 1610(a).

48. *Id.* § 1610(a)(6).

49. *Id.* § 1610(a)(3).

- "the execution relates to a judgment establishing rights in property" that (A) was "acquired by succession or gift," or (B) "is immovable and situated in the United States;"[50]
- the property consists of proceeds from an insurance policy in favor of the State "covering the claim which merged into the judgment;"[51] or
- the judgment relates to a claim arising from the "terrorist act" exception to immunity set forth in § 1605A, "regardless of whether the property is or was involved with the act upon which the claim is based."[52]

The last of these exceptions refers to § 1605A, which was added in 1996 (and later amended and renumbered in 2008) to benefit victims of terrorist acts and similar incidents, and their relatives. It does not require the property to have been involved in the act giving rise to the claim, although the requirement that it be "used for a commercial activity in the United States" remains.[53]

2. Exceptions Applicable to Agencies and Instrumentalities

The exceptions applicable to property of State agencies and instrumentalities are broader than those applicable to property of a State. To begin with, § 1610(b) denies immunity to property of any such entity that is engaged in a commercial activity in the United States, so long as (a) the entity has waived immunity from attachment or execution, or (b) the judgment to be enforced relates

50. *Id.* § 1610(a)(4).

51. *See id.* § 1610(a)(5).

52. *See id.* § 1610(a)(7), *amended by* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083(b)(3)(A), 122 Stat. 3, 341.

53. *See* 28 U.S.C. § 1610(a)(7), (a). A provision was added to FSIA in 1998 (and later amended in 2000), which was intended to make certain property available to victims of terrorist acts irrespective of whether it was used for commercial activity. *See* Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, Div. A, § 101(h) [Title I, § 117(a)], 112 Stat. 2681, 2681-491 to 2681-492 (1998) (adding 28 U.S.C. § 1610(f)); Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002(f), 114 Stat. 1464, 1543 (amending § 1610(f)). In particular, § 1610(f) purports to make available to such claimants certain blocked property of States that have been designated as supporters of terrorism, including even property of their diplomatic missions. This provision is not currently operable, however, because § 1610(f)(3) granted the President the authority to waive this possibility in the interest of national security, and President Clinton exercised that authority. *See* Presidential Determination No. 2001-03, 65 Fed. Reg. 66,483 (Oct. 28, 2000).

to one of several categories of claims for which the entity is not immune under §§ 1605 and 1605A of the FSIA—regardless of whether the property is, or was involved in, the act upon which the claim is based, or was used for commercial activity.[54] As a consequence, assets of a State entity engaged in a commercial activity in the United States will be denied immunity in most cases in which the creditor has succeeded in establishing jurisdiction over that entity.

Moreover, when seeking to reach property of a State agency or instrumentality, it is possible to invoke the exceptions of § 1610(a) in addition to those of § 1610(b). This is evident for two reasons. First, § 1610(a) sets forth exceptions applicable to property of a "foreign state," and that term is defined in § 1603(a) to encompass both States and their agencies and instrumentalities.[55] Second, § 1610(b) provides that it applies "in addition to subsection (a)."[56] In other words, subsection (b) supplements the exceptions of subsection (a) in the context of cases against agencies and instrumentalities. This reading of the provision has been endorsed by at least one court,[57] and is also supported by the legislative history of the FSIA.[58]

iii. Special Protections for Diplomatic, Central Banking, and Military Assets

Certain categories of property of foreign sovereigns receive additional protection beyond that conferred by §§ 1609 and 1610.

One category of protected assets is property in use for diplomatic activities. Such property is specifically protected under international agreements to which the

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54. *See* 28 U.S.C. § 1610(b), *amended by* National Defense Authorization Act for Fiscal Year 2008 § 1083(b)(3)(B), 122 Stat. at 341. Specifically, § 1610(b)(2), as amended, refers to several categories of claims listed in §§ 1605 and 1605A, two provisions of FSIA that set forth exceptions to jurisdictional immunity. *See* 28 U.S.C. § 1605, *amended by* National Defense Authorization Act for Fiscal Year 2008 § 1083(a)(1), (b)(1)(A)–(C), 122 Stat. at 338, 341 (section 1083(a)(1) inserts § 1605A after § 1605). Only a few of the claims with respect to which it is possible to obtain jurisdiction over a foreign sovereign are not covered by this exception.

55. *See* 28 U.S.C. §§ 1610(a), 1603(a).

56. *See id.* § 1610(b).

57. *See* Elliott Assocs., L.P. v. Banco de la Nación, 96 Civ. 7916 (RWS), 2000 U.S. Dist. LEXIS 14169, at *11–12 (S.D.N.Y. Sept. 29, 2000) ("[T]he phrase 'in addition to subsection (a)' in § 1610(b) . . . expands the § 1610(a) foreign state immunity exception to agencies or instrumentalities of foreign states.").

58. *See* H.R. REP. NO. 94-1487, at 29 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6628 ("Section 1610(b) provides for execution against the property of agencies or instrumentalities of a foreign state in circumstances additional to those provided in section 1610(a).").

U.S. adheres.[59] Moreover, the legislative history of the FSIA indicates that Congress intended that "embassies and related buildings could not be deemed to be property used for a 'commercial' activity as required by section 1610(a),"[60] and U.S. courts have consistently treated such property as immune.[61]

Other categories of protected assets are central banking and military property, which are addressed in § 1611(b).[62] If a particular asset is covered by the terms of that provision, it will be treated as immune even if it would otherwise be reachable under § 1610.[63]

In order for central bank assets to qualify for this special protection, there must not have been any waiver of the bank's immunity by the bank or its parent State, and the assets in question must be property of the bank held "for its own account."[64] Moreover, central bank assets will be denied coverage under Section

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59. *See* Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261; Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 (providing in Article 22(3) that "[t]he premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.").

60. *See* H.R. REP. NO. 94-1487, at 29.

61. *See* City of Englewood v. Socialist People's Libyan Arab Jamahiriya, 773 F.2d 31, 36–37 (3d Cir. 1985) (holding that residence of chief of diplomatic mission was not used for commercial activity); S & S Mach. Co. v. Masinexportimport, 802 F. Supp. 1109, 1112 (S.D.N.Y. 1992) (holding that consulate was not used for commercial activity); Liberian E. Timber Corp. v. Gov't of Republic of Liberia, 659 F. Supp. 606, 610–11 (D.D.C. 1987) (finding that embassy bank accounts used to perform diplomatic and consular functions were immune); *see also* 28 U.S.C. § 1610(a)(4)(B) (setting forth an exception to immunity where "the execution relates to a judgment establishing rights in property . . . which is immovable and situated in the United States," but adding that this exception applies only if "such property *is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission*" (emphasis added)).

62. *See* 28 U.S.C. § 1611(b).

63. *See id.*

64. *See, e.g.*, Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran v. Cubic Def. Sys., Inc., 385 F.3d 1206, 1223–1224 (9th Cir. 2004), *rev'd on other grounds*, 546 U.S. 450 (2006) (determining that the mere fact that amounts to be collected by a ministry on an arbitral award were to be held and administered by a central bank did not mean they were immune); Olympic Chartering, S.A. v. Ministry of Indus. & Trade of Jordan, 134 F. Supp. 2d 528, 534 (S.D.N.Y. 2001) (holding that funds "held for its own account" relates to funds "used or held for central banking purposes rather than funds used solely to finance the commercial transactions of other entities or foreign states."); Banco Central de Reserva del Peru v. Riggs Nat'l Bank, D.C., 919 F. Supp. 13, 17 (D.D.C. 1994) (permitting attachment of funds in an account of central bank, because they had been deposited to finance loans to certain commercial entities); Weston Compagnie de Finance et D'Investissement, S.A. v. La Republica del Ecuador, 823 F. Supp. 1106, 1114 (S.D.N.Y. 1993) (funds held in an account owned by a central bank on behalf of private parties are potentially attachable).

1611(b) if the bank is an "alter ego" of the State, such that its separate juridical status need not be respected—a standard discussed *infra* Part II.C.1.b.ii.[65]

As for military property, to qualify for special protection under § 1611(b), the property must be both: (a) used or intended to be "used in connection with a military activity"; and (b) "of a military character" or "under the control of a military authority or defense agency."[66] The mere fact that it is owned by a military authority does not mean it is in use or intended for use in a military activity.[67]

b. Attribution to the Debtor Sovereign

The second element that must be established before an asset of a sovereign will be available to its creditor is that the property is owned by, or is otherwise properly attributable to, the sovereign. Such attribution may be appropriate because the sovereign owns or controls the asset, or because it has a special relationship to the entity that does.

i. Ownership or Control

In general, in the United States, *any* kind of property may be reached by a judgment creditor, to the extent it is owned or controlled by the judgment debtor. In New York, for example, the relevant statutory provision provides that "[a] money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested . . . ."[68] Case law in New York provides further that "a party seeking to enforce a judgment 'stand[s] in the shoes of the judgment debtor in relation to any debt owed him or a property interest he may own.'"[69]

As with any debtor, a sovereign will be presumed to own any asset it possesses.[70] Yet it is by no means necessary to show that the sovereign actually

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65. The Second Circuit acknowledged this possibility in a case in which the author's firm served as counsel for one of the creditors. *See* EM Ltd. v. Republic of Argentina, 473 F.3d 463, 482 (2d Cir. 2007).

66. 28 U.S.C. § 1611(b).

67. *See id. See also Cubic Def. Sys., Inc.*, 385 F.3d at 1222–1223 (holding that ministry failed to demonstrate proceeds on arbitral award were intended for use for military activities).

68. N.Y. C.P.L.R. 5201(b) (McKinney 2008).

69. Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 313 F.3d 70, 83 (2d Cir. 2002) (alteration in original) (quoting Bass v. Bass, 140 A.D.2d 251, 253 (N.Y. App. Div. 1988)).

70. *See, e.g.*, *EM Ltd.*, 473 F.3d at 473–74 (Argentine central bank was presumptively the owner of the funds in a bank account that was in its name); *Karaha Bodas Co.*, 313 F.3d

possesses the asset. If it can be shown that the sovereign owns or controls an asset in the possession of a third party, the property may still be reachable. Similarly, even if the sovereign owns only a *portion* of an asset, it may be reachable to the extent of the sovereign's interest.[71]

It may also be possible to reach tax, royalty, or similar obligations owed by a third party to the sovereign. In other words, the creditor may be able to stand in the shoes of the sovereign and collect payments from the third party as the payments become due.

Complications sometimes arise with such obligations, however, in light of the threshold requirement of § 1610(a) (in cases against foreign states) that the property to be seized must be "used for a commercial activity in the United States."[72] In particular, it may be difficult or impossible to show that the foreign state itself has used the amounts due from the third party for a commercial activity in the United States. Some courts have interpreted that provision as permitting attachment so long as the obligations *arose from* commercial activity in the United States, even if there is no evidence that the amounts due from the third party have been used by the sovereign itself in such an activity.[73] Others, in contrast, have held that the State itself must have *affirmatively employed* the obligations in some way in such an activity[74]—for example, by using payments from the third party as collateral for loans, to settle debts, or for some other purpose.[75]

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at 86 ("Under New York law, the party who possesses property is presumed to be the party who owns it. When a party holds funds in a bank account, possession is established, and the presumption of ownership follows." (citation omitted)).

71. *See Karaha Bodas Co.*, 313 F.3d at 92–93 (affirming the attachment of a portion of a bank account held in trust by Bank of America that was ultimately payable to a state oil company).

72. *See* 28 U.S.C. § 1610(a).

73. *See, e.g.*, Lloyd's Underwriters v. AO Gazsnabtranzit, No. CIVA1:00-MI-0242-CAP, 2000 WL 1719493, at *1–2 (N.D. Ga. Nov. 2, 2000) (holding that license fees owed by U.S. companies to Moldova for the use of a domain name suffix were used for a commercial activity in the United States, because they were generated by such a commercial activity); Alejandre v. Republic of Cuba, 42 F. Supp. 2d 1317, 1339–1341 (S.D. Fla. 1999) (holding that amounts owed by U.S. companies to a Cuban State-owned telephone company were used for commercial activity in the United States, though there was no showing the defendant itself used the property), *vacated on other grounds*; Alejandre v. Telefonica Larga Distancia de Puerto Rico, Inc., 183 F.3d 1277, 1283 n.15, 1290 (11th Cir. 1999).

74. *See* Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd., 475 F.3d 1080, 1091 (9th Cir. 2007) (holding that property is "used for" commercial activity in the United States when "put into action, put into service, availed or employed for a commercial activity" by the State itself (emphasis omitted)); Conn. Bank of Commerce v. Republic of Congo, 309 F.3d 240, 251, 254 (5th Cir. 2002) ("What matters under the statute is what the property is 'used for,' not how it was generated or produced," and not whether it has a "nexus or connection to a commercial activity in the United States."); Trans Commodities, Inc. v. Kaz. Trading House,

ii. Veil-Piercing in the Sovereign Context

When considering the attachability of assets held by a separate entity, it should be kept in mind that, as a general matter, a debtor cannot be deemed to own an asset simply because it owns or controls the entity that does so.[76] Accordingly, if an asset is held by an entity that purports to be distinct from the debtor, it may be necessary to establish a basis for disregarding its separate legal personality.

The U.S. Supreme Court held in the seminal *Bancec* case that State-owned legal entities are presumed to be separate from the State, but that this presumption may be overcome where the entity is "so extensively controlled by its owner that a relationship of principal and agent is created," or where recognizing its separate status would "work fraud or injustice."[77] Moreover, an exception to the general presumption of separateness was added to the FSIA in early 2008. Specifically, 28 U.S.C. § 1610(g) was enacted, which provides that property of an agency or instrumentality of a foreign State may be reached to satisfy a judgment that was entered against the State pursuant to 28 U.S.C. § 1605A—itself a new addition to the FSIA providing jurisdiction for claims relating to "terrorist acts" and similar wrongs—regardless of whether or not the agency or instrumentality is a separate juridical entity, and regardless of the level of control that the State exerts over the

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S.A., No. 96 Civ. 9782 (BSJ), 1997 U.S. Dist. LEXIS 23906, at *5–6 (S.D.N.Y. May 27, 1997) (holding that proceeds of a bond offering were not "used for" a commercial activity in the United States even though the bond offering that gave rise to them constituted such a commercial activity).

75. *See* Af-Cap, Inc. v. Republic of Congo, 383 F.3d 361, 367–68 (5th Cir. 2004) (upholding the district court's determination that royalty obligations owed by Texas oil companies to the Republic of Congo had been "used for commercial activity in the United States," because Congo used them to settle a lawsuit with an insurance company).

76. *See* Dole Food Co. v. Patrickson, 538 U.S. 468, 475 (2003) ("A corporate parent which owns the shares of a subsidiary does not, for that reason alone, own or have legal title to the assets of the subsidiary . . . . The fact that the shareholder is a foreign state does not change the analysis."); EM Ltd. v. Republic of Argentina, 473 F.3d 463, 475 (2d Cir. 2007) (stating that assets of the Argentine central bank could not be treated as assets of the Republic of Argentina simply because the Republic had the power to enact decrees directing the central bank how to dispose of its assets).

77. *See* First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611, 626, 629 (1983). While the Supreme Court did not refer to the test as a species of the alter ego doctrine, some courts have done so. *See, e.g.*, Kensington Int'l Ltd. v. Republic of Congo, 03 Civ. 4578 (LAP), 2007 U.S. Dist. LEXIS 25282, at *20 (S.D.N.Y. Mar. 29, 2007) ("It is well established that an instrumentality's presumption of separateness may be rebutted by evidence establishing an alter ego relationship between the instrumentality and the sovereign state that created it.").

agency or instrumentality. This exception applies only to cases arising from terrorist acts and similar wrongs, however, and so in most cases in which an attempt is made to disregard a sovereign entity's distinct legal personality, the *Bancec* standard will continue to apply.

There have been a number of instances in which a U.S. court, applying the *Bancec* standard, has declined to respect the separate personality of a State agency or instrumentality, and has attributed to it the acts or debts of its parent State, or vice versa.[78] In other cases courts have upheld the separate personalities of such entities.[79] The outcome of such cases generally turns on the available evidence of the relationship between the State and the entity in question and of any injustice that would result from treating the two as distinct—matters with regard to which the creditor may be allowed discovery.[80]

It bears noting that some courts have held that if a State entity's separate status is disregarded for purposes of enforcing a debt against its parent State, then the immunity analysis with respect to its assets should be performed under §

78. *See, e.g.*, *First Nat'l City Bank*, 462 U.S. at 632 (disregarding separate status of Cuban State-owned bank, and attributing its filing of a lawsuit in the United States to the Cuban State, resulting in an immunity waiver); Bridas S.A.P.I.C. v. Gov't of Turkm., 447 F.3d 411, 411, 420 (5th Cir. 2006) (determining that State-owned oil company was an alter ego of the State, so the State could be held liable on an award against the company); TMR Energy Ltd. v. State Prop. Fund of Ukr., 411 F.3d 296, 302 (D.C. Cir. 2005) (determining that Ukrainian State instrumentality was "an agent of the State, barely distinguishable from an executive department of the government," which "should not be treated as an independent juridical entity."); S & Davis Int'l, Inc. v. Republic of Yemen, 218 F.3d 1292, 1299–1300 (11th Cir. 2000) (holding that Yemeni State corporation was not entitled to be treated as distinct from the State); U.S. Fid. & Guar. Co. v. Braspetro Oil Servs. Co., 199 F.3d 94, 98 (2d Cir. 1999) (holding that one State instrumentality was the alter ego of another); Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia, 616 F. Supp. 660, 666 (W.D. Mich. 1985) (disregarding separate status of Ethiopian State instrumentality and attributing its jurisdictional contacts with the United States to the State).

79. *See, e.g.*, Hercaire Int'l, Inc. v. Argentina, 821 F.2d 559, 563-65 (11th Cir. 1987) (concluding that the plaintiff had failed to make the showing required under *Bancec* for overcoming the presumption that a State-owned airline was distinct from the State); Letelier v. Republic of Chile, 748 F.2d 790, 792, 799 (2d Cir. 1984) (concluding that the plaintiff had failed to make the showing required under *Bancec* for overcoming the presumption that a State-owned airline was distinct from the State); Bayer & Willis, Inc. v. Republic of Gambia, 283 F. Supp. 2d 1, 4 (D.D.C. 2003) (declining to disregard separate status of Gambian State telephone company).

80. *See, e.g.*, First City, Texas-Houston, N.A. v. Rafidain Bank, 281 F.3d 48, 54 (2d Cir. 2002) (affirming district court's civil contempt order against State-owned bank for its failure to comply with subpoena pertaining to alter ego theory); First City, Texas-Houston, N.A. v. Rafidain Bank, 150 F.3d 172, 177 (2d Cir. 1998) (holding that district court should have permitted plaintiff to take discovery from State-owned bank going to whether or not it was alter ego of State).

1610(a) (which applies to foreign States), rather than under § 1610(b) (which applies to agencies or instrumentalities).[81]

2. Attachability of Assets in the United Kingdom

Sovereign immunity law in the United Kingdom—which is governed by the State Immunity Act of 1978[82] ("UK SIA")—is arguably somewhat less protective of sovereigns than that in the United States.

Like the FSIA, the UK SIA sets forth a general rule that property of a foreign State is immune from attachment and execution,[83] but provides exceptions to that rule.[84] The first of these exceptions denies immunity to property of a State that has made an express waiver of immunity from execution.[85] This is different from the waiver exception of § 1610(a)(1) of the FSIA in two respects.[86] First, it requires that the waiver be express, whereas § 1610(a) permits it to be implied. Second, it may subject property of a State to execution, even if it is not in use for a commercial activity.

The second exception applies to "property which is for the time being in use or intended for use for commercial purposes . . . ."[87] This is similar to the commercial activity exception of § 1610(a)(2), except that it imposes no requirement that the property have a nexus to the commercial activity that gave rise to the underlying claim, as § 1610(a)(2) requires in the absence of a waiver of immunity.[88]

The only provision of the UK SIA that deals with state entities is section 14(2), which concerns immunity from *jurisdiction* rather than immunity from *attachment or execution*.[89] Specifically, Section 14(2) provides that a separate entity may claim immunity from jurisdiction only if the proceedings relate to an act

81. *See, e.g.*, *EM Ltd.*, 473 F.3d at 480.

82. *See* State Immunity Act, 1978, c. 33 (Eng.).

83. *See id*. § 13(2).

84. *See id*. § 13(3)–(4).

85. *See id*. § 13(3) (providing that the general rule of immunity from execution "does not prevent the giving of any relief or the issue of any process with the written consent of the State concerned; and any such consent (which may be contained in a prior agreement) may be expressed so as to apply to a limited extent or generally . . . .").

86. *See* 28 U.S.C. § 1610(a)(1) (2006).

87. State Immunity Act § 13(4). Section 13(5) goes on to note that a certificate from the head of the State's diplomatic mission in the United Kingdom "to the effect that any property is not in use or intended for use by or on behalf of the State for commercial purposes shall be accepted as sufficient evidence of that fact unless the contrary is proved."

88. *See* 28 U.S.C. § 1610(a)(2).

89. *See* State Immunity Act § 14(2).

by that entity "in the exercise of sovereign authority," and if its parent State in the same circumstances would be entitled to immunity.[90] The implication is that property of entities separate from the State is generally *not* entitled to immunity, provided the entities are not engaged in sovereign activities, and the property is not subject to special rules governing central banking and diplomatic assets.[91]

Finally, case law in the United Kingdom allows assets of a state entity to be treated as assets of the State under some circumstances. Although there is a general rule that courts should respect the separate personality of a state entity, U.K. courts have "pierce[d] the corporate veil" in a number of instances, particularly where the entity has been used by the State as a "sham" to avoid liability. For example, the court held that it was proper to permit a creditor of the Republic of Congo to reach assets owned by certain allegedly independent corporations to satisfy a debt of the Republic, where the creditor had established that the corporations were created by the Republic to engage in trading transactions on its behalf so as to shield its assets from creditors.[92]

A principal-agent relationship may also provide a basis for disregarding an instrumentality's separate status in the United Kingdom, namely where the parent State has so closely controlled and directed a subsidiary that the subsidiary has effectively functioned as the agent of the State and has conducted business on the State's behalf.[93]

3. Attachability of Assets in France

In France, there is no statutory equivalent to the FSIA or the UK SIA, so the law of sovereign immunity has developed through court decisions. One of the leading cases in this regard is *Eurodif Corp. v. Islamic Republic of Iran*,[94] which established a commercial activity exception similar to that recognized in the United States and the United Kingdom. Specifically, the Cour de Cassation, France's

90. *See id.*

91. The UK SIA provides that central banking assets are not to be regarded as "in use or intended for use for commercial purposes." *See id.* § 14(4). *See also* AIG Capital Partners, Inc. v. Republic of Kaz., [2005] EWHC (Comm) 2239, [90]-[95] (Eng.) (holding that a fund established by the Republic of Kazakhstan was unreachable by a creditor because the decree establishing the fund provided for it to be "managed" by the National Bank of Kazakhstan). Diplomatic assets are protected in the United Kingdom by the Vienna Convention on Diplomatic Relations. *See supra* note 59.

92. *See* Kensington Int'l Ltd. v. Republic of Congo, [2005] EWHC (Comm) 2684, [193]-[202] (Eng.).

93. *See, e.g.*, Smith Stone & Knight Ltd. v. Birmingham Corp., [1939] 4 All E.R. 116 (K.B.) (Eng.).

94. Cass. 1e civ., Mar. 14, 1984, Bull. civ. I (Fr.), *translated in* 23 I.L.M. 1062 (1984).

highest court, held that assets of a foreign State are generally immune, but that immunity will be denied if the property "was intended to be used for the economic or commercial activity of a private law nature upon which the claim [was] based."[95] Subsequently, the Paris Court of Appeals went even further and held, in *Creighton Ltd. v. Qatar*, that all property of a debtor state used for "commercial ends" is potentially reachable by its creditors.[96]

French courts also recognize a "waiver" exception to immunity from execution. Notably, the Cour de Cassation held in the *Creighton* case that Qatar's agreement to refer disputes to arbitration in accordance with the Rules of Arbitration of the International Court of Arbitration of the International Chamber of Commerce ("ICC") constituted an implied waiver of immunity from execution, based on the fact that such rules provided that the parties agreed to carry out any award of the tribunal without delay.[97] It bears noting, however, that the Paris Court of Appeals has held that a general contractual waiver of immunity from execution does not extend to property associated with *diplomatic* activities, which is specifically protected by the Vienna Convention on Diplomatic Relations.[98]

French courts will also permit a creditor to reach the assets of a separate State agency or instrumentality if the entity can be shown to be an *émanation* of the State. This requires a finding that the entity's "patrimony" is dependent upon the State, i.e., that its budget relies on contributions from the State, or that the State dictates to the entity how to handle its finances.[99]

It bears noting that French courts generally treat central banks no differently than other state entities. Accordingly, if a central bank is legally distinct from the state, then its assets will be denied immunity, but they may be reached only by the bank's own creditors, and not those of the state.[100] In contrast, if the

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95. The court in that case vacated an attachment of certain loan proceeds due to the Iranian government because the government had not yet put the proceeds to any specific use, and hence they could potentially be used for sovereign purposes. *See id.* at 1069–1170.

96. Cour d'appel [CA] [regional court of appeal] Paris, 1re ch. G, Dec. 12, 2001, *reprinted in* REVUE DE L'ARBITRAGE 417, 418 (2003).

97. Cass. 1e civ., July 6, 2000, Bull. civ. I (Fr.), *reprinted in* REVUE DE L'ARBITRAGE 114 (2001).

98. Cour d'appel [CA] [regional court of appeal] Paris, 1re ch. A, Aug. 10, 2000, *reprinted in* 15 MEALEY'S INT'L ARB. REP. A-3 (2000). For a discussion of this case, see Nancy B. Turck, *French and US Courts Define Limits of Sovereign Immunity in Execution and Enforcement of Arbitral Awards*, 17 ARB. INT'L 327, 330–331 (2001).

99. *See, e.g.*, Cass. 1e civ., Nov. 14, 2007, Bull. civ. I (Fr.) (holding that a company owned by the Republic of Cameroon was an *émanation* of the Republic of Cameroon, and that its assets could be reached by creditors of the Republic); Cass. 1e civ., Feb. 6, 2007, Bull. civ. I (Fr.) (holding that a Congolese State-owned corporation was an *émanation* of the Republic of Congo, and that its assets could be reached by creditors of the Republic).

100. *See* MICHEL COSNARD, LA SOUMISSION DES ETATS AUX TRIBUNAUX INTERNES: FACE A LA THEORIE DES IMMUNITES DES ETATS 174 (1996); *see also* Cass. 1e civ., July 15, 1999,

bank is an *émanation* of the State, lacking in independent patrimony, then it will be treated as equivalent to the State itself. In that event, the bank may invoke immunity for its assets, but only to the extent the State could do so, and any of its non-immune assets are reachable by creditors of the State.[101]

4. Attachability of Assets Under the UN Convention

An effort has been underway for some time under the auspices of the United Nations to implement an international convention on sovereign immunity, in order to establish more uniform parameters for the sovereign immunity doctrine around the world.[102] This has been an exceedingly difficult undertaking due to major differences of opinion among nations regarding the extent to which sovereigns and their property should be protected from judicial scrutiny and enforcement.[103]

The UN General Assembly finally adopted such a convention in December 2004, but it has not yet become operable. The UN Convention provides by its terms that it will not enter into force until it has been signed and ratified by at least 30 countries; to date, only 28 countries have signed, and most of them have not yet deposited instruments of ratification.[104] Moreover, the Convention was open for signature only until January 17, 2007.[105] Accordingly, it now rests in a state of limbo with an uncertain future.

Bull. civ. I (Fr.), *reprinted in* JOURNAL DU DROIT INTERNATIONAL 45 (2000) (holding that the Central Bank of Iraq was not an *émanation* of the State because it performed commercial operations and had its own budget and assets).

101. *See* COSNARD, *supra* note 100.

102. The preamble to the UN Convention indicates that its adoption was motivated principally by the belief that it "would enhance the rule of law and legal certainty, particularly in dealings of States with natural and juridical persons, and would contribute to the codification and development of international law and the harmonization of practice in this area." *See* UN Convention, *supra* note 18.

103. *See* Joanne Foakes & Elizabeth Wilmshurst, *UN Convention on Jurisdictional Immunities of States and Their Property*, 7 BUS. L. INT'L 105, 110 (2006) (summarizing the history of negotiations, and noting that the Soviet Union and China favored absolute sovereign immunity, whereas countries in Western Europe and the United States advocated a restrictive approach).

104. *See* Secretariat of the Comm. of Legal Advisers on Pub. Int'l Law, *State of Signatures and Ratifications of the UN Convention on Jurisdictional Immunities of States and Their Property and the European Convention on State Immunity*, *delivered at the 34th Meeting of the Committee of Legal Advisers on Public International Law*, CAHDI (2007) Inf 14 (Sept. 10–11, 2007). The signatories include, among others, China, France, Japan, the Russian Federation, Switzerland, and the United Kingdom, but not the United States.

105. *See id.*

Article 19 of the UN Convention permits post-judgment enforcement measures if: (a) the State has explicitly consented to the measures (as in a written agreement, declaration, or communication); (b) the State has allocated property for the satisfaction of the claim, such as by providing collateral for its obligations in a contract; or, (c)

> it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed.[106]

The first of the above exceptions is similar to the waiver exception found in U.S., U.K., and French law.[107] The second exception is related to the first in that it involves a situation where the State has consented to having the judgment satisfied in a particular manner. The third exception is similar to the commercial activity or commercial purpose exceptions discussed previously.[108]

Article 21, in turn, sets forth a non-exhaustive list of property *not* to be considered as intended for use for "other than government non-commercial purposes," including:

- bank accounts or other property "which is used or intended for use in the performance of the functions of the diplomatic mission of the State;"
- "property of a military character or used or intended for use in the performance of military functions;"
- "property of the central bank or other monetary authority of the State;"
- "property forming part of the cultural heritage of the State" and not intended to be placed on sale; and
- "property forming part of an exhibition of objects of scientific, cultural or historical interest" and not intended to be placed on sale.[109]

As noted above, Article 19 requires not only that the property be in use or intended for use for "other than government non-commercial purposes," but also

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106. *See* UN Convention, *supra* note 18, art. 19.
107. *See supra* Part II.C.1–3.
108. *See id*.
109. *See* UN Convention, *supra* note 18, art. 21.

that it have a "connection with the entity against which the proceeding was directed."[110] This requires that the property must be properly attributable to the debtor State. The UN Convention's Annex clarifies that the term "entity" refers to "the State as an independent legal personality, a constituent unit of a federal State, a subdivision of a State, an agency or instrumentality of a State or other entity, which enjoys independent legal personality."[111] The Annex adds that the phrase, "property that has a connection with the entity," is to be understood "as broader than ownership or possession" and that this article "does not prejudge the question of 'piercing the corporate veil' questions relating to a situation where a State entity has deliberately misrepresented its financial position or subsequently reduced its assets to avoid satisfying a claim, or other related issues."[112] In other words, the UN Convention acknowledges that creditors of a State may be able to reach property owned by a state entity under a veil-piercing or similar theory, but leaves the matter to local law.

Another notable feature of the UN Convention is that State agencies and instrumentalities may invoke immunity only to the extent "they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State."[113] This approach is similar to that followed in the United Kingdom and France.[114]

D. Domesticating the Ruling Where Attachable Assets Are Located

If the creditor has identified assets of the sovereign that are potentially attachable, it will need the assistance of local authorities to reach them. If the ruling is a judgment from a court in the place where enforcement is sought, then the creditor generally may proceed promptly with whatever steps are required to execute against non-immune assets in the relevant country.[115] In other cases, the creditor will first have to ask a local authority to domesticate the ruling before pursuing execution. (As discussed *infra*, in Part II.D.4, it may also be appropriate to seek an attachment of the sovereign's local assets while domestication proceedings are underway, to prevent the sovereign from removing the assets from the jurisdiction.)

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110. *See id.* art. 19(c).
111. *Id.* Annex to the Convention.
112. *Id.*
113. *See id.* art. 2(1).
114. *See supra* Part II.C.2–3.
115. In some countries, it may be necessary to wait for a period of time before executing against assets of the sovereign in order to allow the sovereign an opportunity to satisfy the judgment voluntarily. In the United States, for example, the relevant statute requires a creditor to delay a "reasonable period of time." *See infra* Part II.E.

The nature of the ruling can have a major impact on its prospects for domestication. Foreign arbitral awards are generally easier to domesticate than foreign court judgments by virtue of certain international conventions that govern this process. The most important of these is commonly referred to as the New York Convention,[116] but another, known as the Inter-American, or the Panama Convention, is also adhered to by the United States and certain other countries.[117] In addition, awards rendered by one particular body, the International Centre for the Settlement of Investment Disputes ("ICSID"), benefit from an even more enhanced enforcement mechanism, which eliminates altogether the need to subject awards to local judicial review.[118]

The subsections that follow discuss the standards applicable to the domestication of arbitral awards and court judgments, and to different types of arbitral awards, giving particular consideration to complications that can arise in cases against sovereigns. The possibility of obtaining pre-judgment attachment or other interim relief is also considered.

1. Confirmation of Arbitral Awards Under the New York Convention or the Panama Convention

Arbitrations against sovereigns arising from commercial contracts may be conducted under the arbitration rules of any number of institutions, or under a set of ad hoc rules, as selected by the parties. Such rules could include, for example, those of the ICC, the International Centre for Dispute Resolution, the London Court of International Arbitration, or the United Nations Commission on International Trade Law ("UNCITRAL Rules").

Enforcement of such awards is frequently governed by the New York Convention, which has been signed and ratified by more than 140 countries.[119] That Convention applies by its terms to both foreign awards and awards that are "not considered domestic" under the law of the country where they were made.[120] (In the

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116. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (codified at 9 U.S.C. § 201 (1970) [hereinafter New York Convention].

117. *See* Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, O.A.S.T.S. No. 42, 1438 U.N.T.S. 245. This Convention was adopted among the Member States of the Organization of American States.

118. ICSID arbitration is discussed in detail *infra* Part II.D.2.

119. For a current list of signatories, see U.N. Comm'n on Int'l Trade Law, Status: 1958 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Oct. 12, 2008) [hereinafter UNCITRAL Website].

120. *See* New York Convention, *supra* note 116, art. 1(1).

United States, the latter phrase has been interpreted to refer to awards rendered in the United States in cases that involve at least one foreign party, or arise from a contract with a substantial foreign nexus.[121]) It bears noting, however, that some countries, including the United States, will apply the Convention only to awards rendered in countries that adhere to the New York Convention, which arise from legal commercial relationships.[122]

Less frequently, the review of the award is governed by the Panama Convention, an agreement among many of the members of the Organization of American States, which is closely modeled on the New York Convention. Courts in the United States apply the Panama Convention when a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Panama Convention, and are member states of the Organization of American States.[123]

As will be seen below, the New York Convention and the Panama Convention both require a court to recognize an award unless it finds one of the grounds for non-recognition set forth in the relevant convention, all of which have been narrowly construed by U.S. courts. As will be seen, however, before a court in the United States will apply one of these conventions, it must first conclude that certain jurisdictional prerequisites are met.

a. Subject Matter Jurisdiction

The FAA grants original subject matter jurisdiction to federal district courts in proceedings to confirm awards that are governed by the New York Convention or the Panama Convention.[124] In cases involving private respondents, this conclusively establishes such a court's subject matter jurisdiction. In cases

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121. *See* Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH, 141 F.3d 1434, 1441 (11th Cir. 1998); Bergesen v. Joseph Muller Corp., 710 F.2d 928, 932 (2d Cir. 1983). *See also* 9 U.S.C. § 202 (2006) ("An agreement or award arising out of [a commercial legal] relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.").

122. *See* UNCITRAL Website, *supra* note 119 (noting that the United States acceded to the Convention with the reservations that it "will apply the Convention only to recognition and enforcement of awards made in the territory of another contracting State" and "to differences arising out of legal relationships, whether contractual or not, that are considered commercial"). A similar reciprocity requirement exists under the Panama Convention. *See* 9 U.S.C. § 304 (2006).

123. *See* 9 U.S.C. § 305. An exception exists if the parties have agreed that the Panama Convention will *not* apply. *See id.*

124. *See* 9 U.S.C. §§ 203, 302.

involving foreign sovereigns, in contrast, a creditor must also satisfy the FSIA, which provides that such a sovereign is immune from jurisdiction unless the claim falls within one of the exceptions of §§ 1605 to 1607 of that statute.[125]

Fortunately for a creditor seeking to confirm a foreign arbitral award, a special exception exists for this context. In particular, § 1605(a)(6)(B) provides:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which the action is brought . . . to confirm an award made pursuant to . . . an agreement to arbitrate, if *the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards*.[126]

This exception has been held to apply to proceedings to confirm or recognize arbitral awards subject to the New York Convention or the Panama Convention.[127]

b. Personal Jurisdiction

Some courts have held that they may not hear an application to confirm a foreign arbitral award against a private respondent unless they have jurisdiction over the person of the respondent, or *quasi-in-rem* jurisdiction over its property, in addition to subject matter jurisdiction.[128] Jurisdiction over the person requires a

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125. *See* 28 U.S.C. § 1604 (2006).

126. *Id.* § 1605(a)(6)(B) (emphasis added).

127. *See, e.g.*, Creighton Ltd. v. Gov't of Qatar, 181 F.3d 118, 123–124 (D.C. Cir. 1999).

128. *See, e.g.*, Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory," 283 F.3d 208 (4th Cir. 2002), *cert. denied*, 537 U.S. 822 (2002); Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1128 (9th Cir. 2002) ("[T]he Convention and the FAA authorize the exercise of subject matter jurisdiction but not personal jurisdiction. Personal jurisdiction must be based on a defendant's person or property."); CME Media Enterprises B.V. v. Zelezny, No. 01 Civ. 1733 (DC), 2001 U.S. Dist. LEXIS 13888, at *15–16 (S.D.N.Y. Sept. 10, 2001) (confirming an arbitral award on the basis of *quasi in rem* jurisdiction to the extent of respondent's assets). Other courts have disagreed. *See, e.g.*, Pure Fishing, Inc. v. Silver Star Co., 202 F. Supp. 2d 905, 909 (N.D. Iowa 2002); Lenchyshyn v. Pelko Elec., Inc., 281 A.D.2d 42, 49–50 (N.Y. App. Div. 2001). The Second Circuit has not yet ruled on this issue, having passed on opportunities to do so. *See, e.g.*, Dardana Ltd. v. A.O. Yuganskneftegaz, 317 F.3d 202, 208 (2d Cir. 2003). The Second Circuit will have another opportunity to decide this issue, however, in a case now on appeal.

finding that the respondent has consented to jurisdiction, or has certain "minimum contacts" with the forum, such that exercise of jurisdiction would be consistent with the Due Process Clause of the Fifth Amendment to the U.S. Constitution,[129] while *quasi-in-rem* jurisdiction requires the presence of property in the forum.[130]

Even in courts that require personal or *in rem* jurisdiction, as a general matter, it may not be necessary to establish either in a case against a foreign sovereign. The FSIA provides that "[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction [under the FSIA] where service has been made under section 1608 of [Title 28]."[131] So the FSIA seems to contemplate that personal jurisdiction is automatic once subject matter jurisdiction has been established and service of process has been effectuated pursuant to the terms of the FSIA.[132]

While it has been pointed out that Congress could not endow a court with personal jurisdiction by virtue of a statute if the exercise of such jurisdiction would be contrary to the Due Process Clause of the U.S. Constitution,[133] a number of courts have concluded that a foreign State is not a "person" protected by the Due Process Clause, and therefore it is not necessary to verify that the exercise of

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See Frontera Res. Azer. Corp. v. State Oil Co. of Azer. Republic, 479 F. Supp. 2d 376 (S.D.N.Y. 2007).

129. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945); *Glencore Grain Rotterdam B.V.*, 284 F.3d 1114 at 1121.

130. *See, e.g.*, *Glencore Grain Rotterdam B.V.*, 284 F.3d at 1121–1122, 1127. Courts have differed over whether the property providing the basis for *quasi-in-rem* jurisdiction must be related to the cause of action. *Compare Glencore Grain Rotterdam B.V.*, 284 F.3d at 1126–1128 (presence of property is sufficient), *with Base Metal Trading, Ltd.*, 283 F.3d at 211 ("[T]he mere presence of seized property in Maryland provides no basis for asserting jurisdiction when there is no relationship between the property and the underlying action"). The former approach seems more harmonious with *Shaffer v. Heitner*, 433 U.S. 186 (1977). In that case, the Supreme Court held that, for *quasi-in-rem* jurisdiction to exist, normally the property must be related to the cause of action, but noted an exception for enforcement actions where the debt has already been determined in a court of competent jurisdiction. *See id.* at 209–210, 210 n.36. Such an exception likewise seems fitting in a typical proceeding to confirm an arbitral award, because the merits have already been adjudicated, and the petition merely seeks enforcement against local property.

131. 28 U.S.C. § 1330(b) (2006).

132. *See* Stern v. Islamic Republic of Iran, 271 F. Supp. 2d 286, 298 (D.D.C. 2003) ("The FSIA . . . provides that personal jurisdiction over defendants will exist where service of process has been accomplished pursuant 28 U.S.C. § 1608 and plaintiff establishes the applicability of an exception to immunity pursuant to 28 U.S.C. § 1605.").

133. *See, e.g.*, Tex. Trading & Milling Corp. v. Fed. Republic of Nigeria, 647 F.2d 300, 308 (2d Cir. 1981) ("[T]he [FSIA] cannot create personal jurisdiction where the Constitution forbids it. Accordingly, each finding of personal jurisdiction under the FSIA requires, in addition, a due process scrutiny of the court's power to exercise its authority over a particular defendant.").

personal jurisdiction would comport with the requirements of the Due Process Clause.

This line of authority finds its origin in *Argentina v. Weltover*, in which the U.S. Supreme Court suggested that "a foreign sovereign might not be a 'person' for jurisdictional Due Process purposes."[134] Several years after that decision, the D.C. Circuit picked up on that language and held, in *Price v. Socialist People's Libyan Arab Jamahiriya*, that foreign states are not "persons" for purposes of the Due Process Clause.[135] Several other courts have since reached the same conclusion.[136]

The reasoning of *Price* and its progeny is well-founded. In fact, Congress may have been mindful of a foreign State's inability to raise objections under the Due Process Clause when it provided in the FSIA that personal jurisdiction would exist once the Act's subject matter jurisdiction provisions were satisfied and the sovereign had been served.[137] This makes sense if one considers that the subject matter analysis in a FSIA case is to some extent a proxy for a personal jurisdiction analysis, in that it tends to screen out cases lacking a nexus with the United States or the sovereign's consent to suit in this country. Specifically, § 1605 of the FSIA provides that courts will have subject matter jurisdiction in a case against a foreign state only if the state has implicitly or explicitly waived immunity (i.e., has consented to suit in the forum), if the claim is based on the State's commercial activity in the United States, or if certain other factors are present, which require some sort of nexus between the claim (or the State) and the United States.[138] If a court has applied these provisions and has concluded that subject matter jurisdiction is indeed present, then generally it would be redundant to undertake a separate examination to verify the existence of "minimum contacts" with the forum.

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134. *See* Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 619 (1992).

135. 294 F.3d 82, 97 (D.C. Cir. 2002).

136. *See, e.g.*, Cassirer v. Kingdom of Spain, 461 F. Supp. 2d 1157, 1167–1168 (C.D. Cal. 2006) ("[U]nder the FSIA, 'subject matter jurisdiction plus service of process equals personal jurisdiction,'" whereby the "Due Process Clause imposes no limitation on a court's exercise of personal jurisdiction over a foreign state."); Cruz v. United States, 387 F. Supp. 2d 1057, 1067 (N.D. Cal. 2005) (following *Price*); Rux v. Republic of Sudan, No. 2:04cv428, 2005 U.S. Dist. LEXIS 36575, at *53 n.14 (E.D. Va. Aug. 25, 2005) ("The FSIA is the sole source of personal jurisdiction over a foreign state because the protections of Due Process are not extended to foreign states.").

137. A similar observation was made in *Rux*, 2005 U.S. Dist. LEXIS 36575, at *66 ("By providing for personal jurisdiction in the FSIA, Congress implicitly endorsed the view that the constitution does not limit a court's jurisdiction *in personam* over foreign states.").

138. *See* 28 U.S.C. § 1605 (2006), *amended by* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083(b)(1)(A)–(C), 122 Stat. 3, 341. It could be argued that this is not so with the "arbitral award" exception of § 1605(a)(6)(B). Yet with proceedings to recognize a foreign award, there is no reason to require a nexus between the underlying claims and the United States, because the claims have already been adjudicated, and the applicant seeks merely to reach assets *located in the United States*.

The law is not settled on this issue, however, because no other federal court of appeals has endorsed the reasoning of the D.C. Circuit in *Price*, and those courts who have encountered the issue have sidestepped it by continuing to assume, without deciding, that foreign States are entitled to Due Process protections.[139] Accordingly, in some jurisdictions it may remain necessary to establish "minimum contacts" with the forum or consent to jurisdiction.

It is also not settled whether or not State instrumentalities are "persons" within the meaning of the Due Process Clause. For its part, the D.C. Circuit has held that an instrumentality should be treated as a State (i.e. lacking the protections of the Due Process Clause) at least where it has acted as the agent of its parent State, or where a fraud or injustice would result from treating the agency or instrumentality as separate from the State. This approach is, of course, based on the *Bancec* standard discussed previously.

One court to take this approach was the D.C. Circuit, in *TMR Energy Ltd. v. State Property Fund of Ukraine*.[140] In that case, the court held that if a State exerts sufficient control over a state-owned enterprise "to make it an agent of the State, then there is no reason to extend to the [state-owned enterprise] a constitutional right that is denied to the sovereign itself."[141] Applying this rule to the facts before it, the court concluded that the respondent instrumentality could not invoke the Due Process Clause because it was closely controlled by the State, and was "an agent of the State, barely distinguishable from an executive department of the government."[142] Significantly, moreover, the court added that "[i]t is far from obvious that even an independent [instrumentality] would be entitled to the protection of the fifth amendment [sic]," because there are limits on the extent to which an alien is protected by the Constitution.[143] The court noted further that while

139. *See, e.g.*, Altmann v. Republic of Austria, 317 F.3d 954, 970 (9th Cir. 2002) (observing that it might not be necessary to establish that the exercise of jurisdiction over sovereign entities was consistent with the Due Process Clause, but nevertheless proceeding to confirm that it would be); S & Davis Int'l, Inc. v. Republic of Yemen, 218 F.3d 1292, 1303-–1304 (11th Cir. 2000); Hanil Bank v. PT. Bank Negara Indon., 148 F.3d 127, 134 (2d Cir. 1998) (noting that the issue was left open in *Weltover* and declining to "resolve the exact status of a foreign sovereign for due process analysis").

140. *See* TMR Energy Ltd. v. State Prop. Fund of Ukr., 411 F.3d 296 (D.C. Cir. 2005). This decision came on the heels of a similar ruling by the U.S. District Court for the Northern District of California, in *Cruz*, 387 F. Supp. 2d at 1067.

141. *TMR Energy Ltd.*, 411 F.3d at 301.

142. *Id.* at 302.

143. *See id.* (citing United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990) ("[A]liens receive constitutional protections [only] when they have come within the territory of the United States and developed substantial connections with this country.") (second alteration in original), and Jifry v. FAA, 370 F.3d 1174, 1182 (D.C. Cir. 2004) ("[N]on-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections.")). *See also* Afram Exp. Corp. v. Metallurgiki Halyps, S.A., 772

many courts have assumed that "the minimum contacts test applies in suits against foreign 'persons,'" this "appears never to have been challenged."[144]

This approach makes sense. It is only fair for State agencies and instrumentalities to be treated like States for purposes of the Due Process Clause, if they are able to invoke the FSIA when objecting to subject matter jurisdiction. An entity should not be permitted to cast itself in the guise of a sovereign one moment, only to be treated as a private party the next.[145] If, however, state-owned corporations were treated like any other commercial entity for purposes of subject matter jurisdiction, then there would be nothing unfair about conferring the protections of the Due Process Clause on those entities, to the extent such protections are conferred on other commercial entities.[146]

c. Forum Non Conveniens

A creditor seeking to confirm a foreign arbitral award in the United States may also have to overcome an attempt to have the case dismissed on the basis of *forum non conveniens*, a common law doctrine that permits a court to decline to

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F.2d 1358, 1362 (7th Cir. 1985) (observing that although "[c]ountless cases assume" that foreign companies are entitled to Due Process protection, the assumption has never been examined).

144. *TMR Energy Ltd.*, 411 F.3d at 302 (citing *Afram Exp. Corp.*, 772 F.2d at 1362).

145. One commentator has described the D.C. Circuit's reasoning as "circular," asserting that it "will always result in the agency or instrumentality not receiving any due process protections." *See* S.I. Strong, *Enforcement of Arbitral Awards Against Foreign States or State Agencies*, 26 NW. J. INT'L L. & BUS. 335, 345–346 (2006). According to Dr. Strong, this result is inevitable because an agency or instrumentality is not covered by FSIA unless "a sufficient amount of control exists so as to create a relationship of principal and agent," while—under the reasoning of the D.C. Circuit—if such a relationship exists, the entity "can be equated with the state and the U.S. court need not extend any due process rights to the agency or instrumentality under the U.S. Constitution." *See id.* at 346. In fact, however, it is not necessary for an agency or instrumentality to be subject to any particular degree of control by its parent State to be covered by FSIA. Rather, it need only be "a separate legal person" not organized under the laws of the United States or any third country, that is either "an organ of a foreign state or political subdivision thereof," or a corporate entity whose shares are owned by a foreign State. *See* 28 U.S.C. § 1603(b) (2006). Accordingly, the existence of such an agency relationship does not necessarily follow from an entity's status as an instrumentality within the meaning of the statute.

146. Under current law, an agency or instrumentality engaged in commercial activity will be immune from jurisdiction even if the claim asserted against it arises from its commercial activity, unless the activity in question has a specified nexus with the United States or one of the other exceptions to immunity is present. *See* 28 U.S.C. § 1605, *amended by* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083(b)(1)(A)–(C), 122 Stat. 3, 341.

exercise jurisdiction under some circumstances where the forum would be inconvenient for the defendant.[147] Where this doctrine is applicable, courts employ a two-part test to determine if *forum non conveniens* provides a basis for dismissal. First, the party seeking dismissal must demonstrate that an adequate alternative forum exists. Second, the court weighs various public and private interest factors to determine whether the case should be dismissed in favor of that alternative forum.[148]

Although this doctrine was developed in the context of lawsuits seeking the adjudication of disputes on the merits by courts of first instance, a few courts have applied it in proceedings to recognize foreign arbitral awards, which seek only to confirm determinations made by an arbitral tribunal. One such decision was rendered in the *Monde Re* case.[149] The Second Circuit upheld the decision by a district court to dismiss a proceeding to confirm a foreign arbitral award initiated by a Monaco company, Monde Re, against the State of Ukraine and a State instrumentality, Naftogaz.[150] Monde Re had obtained an arbitral award against Naftogaz in Russia, and sought recognition in New York against both Naftogaz and the State of Ukraine—although the latter had not been a party to the arbitration—under a theory that Naftogaz was an alter ego of the State.[151] The district court concluded that dismissal was appropriate under the doctrine of *forum non conveniens*, emphasizing that elaborate discovery would be necessary for the court to rule on the alter ego theory, and that the relevant witnesses were located in Ukraine, outside of its subpoena power.[152] On appeal, the Second Circuit affirmed the dismissal.[153]

This result may be attributable to the unusual fact that the claimant sought to confirm an award against a party not involved in the underlying arbitration, which made the proceeding somewhat analogous to a complaint seeking the adjudication of a new issue. One cannot help but wonder, though, why the court dismissed the proceeding *in its entirety*, rather than as against the State of Ukraine only. It did not explain its reasoning in this regard.

In any event, application of the doctrine of *forum non conveniens* to proceedings to confirm arbitral awards does not appear to have become widespread. Notable among the cases in which courts have declined to apply it in this context is the D.C. Circuit's opinion in *TMR Energy*.[154] The D.C. Circuit reasoned that there

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147. *See* Piper Aircraft v. Reyno, 454 U.S. 235, 241 (1981).

148. *See id*.

149. *See* Monegasque de Reassurances S.A.M. (Monde Re) v. NAK Naftogaz of Ukraine, 311 F.3d 488 (2d Cir. 2002).

150. *See id.* at 491. The district court's decision is reported at 158 F. Supp. 2d 377 (S.D.N.Y. 2001).

151. *See id.* at 491–492.

152. *See id.* at 493.

153. *See id.* at 491.

154. *See* TMR Energy Ltd. v. State Prop. Fund of Ukr., 411 F.3d 296 (D.C. Cir. 2005).

could be no adequate alternative forum for the applicant's purposes because "only a court of the United States (or one of them) may attach the commercial property of a foreign nation located in the United States."[155] The court added that this reasoning applies irrespective of whether the applicant has actually located attachable assets of the foreign State in the United States, because even if such assets are not available at present, the foreign State may own attachable property in the United States in the future, and "having a judgment in hand will expedite the process of attachment."[156]

There is logic to the D.C. Circuit's conclusion. *Forum non conveniens* is generally ill-suited to proceedings on a foreign arbitral award, but particularly in cases governed by the New York Convention or Panama Convention. As will be seen below, those conventions specify the *exclusive* grounds under which a court may decline to recognize an award, and do not include "inconvenience of the forum" or any similar ground. To the contrary, these conventions are designed to facilitate recognition around the world—a goal that would be frustrated if courts could decline recognition because another country would be a more convenient forum for the party resisting enforcement.

d. The Standard for Recognition and Enforcement of Awards Under the New York Convention and the Panama Convention

If the foregoing threshold obstacles are overcome, the court should proceed to apply the standard for recognition and enforcement of the arbitral award set forth in the New York Convention or the Panama Convention, if one of these conventions applies. The standard is almost identical under both, because this aspect of the Panama Convention was copied from the New York Convention. In fact, the relevant articles of both have the same number, Article V.

Article V of each provides that a court in a signatory country may decline to recognize and enforce an arbitral award only if the court finds one of various specified grounds.[157] These grounds do not extend to the merits of the underlying dispute, and thus do not permit a reviewing court to substitute its appreciation of the merits for that of the arbitral tribunal.

Most of the Article V grounds for non-recognition are designed to ensure the integrity and fairness of the arbitral proceedings. The grounds in question

155. *Id.* at 303.
156. *See id.*
157. The FAA likewise provides that a U.S. court must enforce a foreign arbitral award covered by one of these conventions unless the court finds one of the grounds for refusal of recognition set forth in Article V of the relevant convention. *See* 9 U.S.C. §§ 207, 302 (2006). *See also* Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier, 508 F.2d 969, 974, 977 (2d Cir. 1974) (holding that the Article V grounds are the exclusive basis for non-recognition).

permit non-recognition in the event that the losing party was denied due process (whether because it lacked notice of the proceedings, was unable to present its case, or there was some irregularity in the constitution of the arbitral tribunal); the dispute was not properly before the arbitral tribunal in the first place (because there was no valid arbitration agreement or the dispute was not within its scope); or the award has been set aside by a court in the country where it was rendered.

There are only two Article V grounds that would permit a court to make reference to its domestic legal standards. The first applies where the subject matter of the award is incapable of arbitration under local law.[158] The second applies where enforcement of the award would offend local "public policy."[159] If broadly construed, these last two grounds would give considerable leeway to a reviewing court and undermine these conventions' purpose of facilitating ready enforcement of arbitral awards around the world. Fortunately, however, courts in the United States have narrowly construed them, and, in practice, courts rarely decline recognition under them.[160]

In light of the narrowness of the grounds for non-recognition in Article V, U.S. courts confirm awards in the vast majority of cases in which they apply them. This is equally true in cases involving foreign sovereigns. Recognition has been refused on the basis of one of the Article V grounds in only a handful of such cases.[161]

e. Domestic Vacatur Grounds

If the award the creditor is seeking to confirm was rendered *within* the United States, it is possible that a U.S. court will apply domestic vacatur standards when reviewing the award, rather than the Article V standard. Although some courts have held that the New York Convention governs the judicial review of an award arising from an arbitration that involved a foreign party, even if the award was rendered in the United States,[162] others have concluded that such an award may

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158. *See* New York Convention, *supra* note 116, art. V(2)(a).

159. *See id.* art. V(2)(b).

160. *See, e.g.*, *Parsons & Whittemore Overseas Co.*, 508 F.2d at 974 (concluding that the public policy ground must be "construed narrowly" to be applied "only where enforcement would violate the forum state's most basic notions of morality and justice.").

161. *See, e.g.*, TermoRio S.A. E.S.P. v. Electranta S.P., 487 F.3d 928, 940–941 (D.C. Cir. 2007) (affirming dismissal of an application to confirm a foreign award on the ground that it had been set aside in the country where made); Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd., 191 F.3d 194 (2d Cir. 1998).

162. *See, e.g.*, Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH, 141 F.3d 1434, 1445 (11th Cir. 1998).

also be reviewed under § 10 of the FAA, which governs the vacatur of domestic awards.[163]

Section 10 provides that a federal district court in the district where the award was made may set aside an award:

> (1) where the award was procured by corruption, fraud, or undue means;
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[164]

Like the grounds for non-recognition of an award in Article V, these grounds are designed to ensure that there has been no denial of due process and or major procedural irregularity in the arbitration; they do not authorize a reviewing court to evaluate the merits of the dispute and to substitute its own judgment for that of the arbitral tribunal.

And while some courts have read into Section 10 an additional ground commonly referred to as "manifest disregard of the law," even this ground is defined narrowly. In the Second Circuit, for example, an award may not be deemed in manifest disregard of the law unless the arbitral tribunal committed an error that was "obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator," *and* the arbitral tribunal "appreciate[d] the existence of a clearly governing legal principle but decide[d] to ignore or pay no

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163. *See, e.g.*, Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc., 126 F.3d 15, 21–23 (2d Cir. 1997). Courts occasionally apply the vacatur grounds of a *state* international arbitration statute in their review of awards of this nature, often without even acknowledging the potential applicability of § 10 of the FAA or Article V of the New York Convention. *See, e.g.*, Rintin Corp., S.A. v. Domar, Ltd., 476 F.3d 1254, 1257–1258 (11th Cir. 2007); Peace River Seed Co-Op, Ltd. v. Proseeds Mktg., Inc., 132 P.3d 31, 33–34 (Or. Ct. App. 2006). Such state vacatur grounds generally do not deviate substantially from those of the FAA or the New York Convention, however.

164. Federal Arbitration Act, 9 U.S.C. § 10 (2006).

attention to it."[165] Because arbitrators are not often inclined to flout the law in such a manner, it is rare for awards to be overturned on this ground.

In light of the narrowness of Section 10's vacatur grounds, any possible decision by a court to apply them usually will not significantly impact the award's prospects for confirmation.

2. Recognition and Enforcement of ICSID Awards

ICSID is an arm of the World Bank that was created to administer the arbitration of investment disputes between foreign investors and States. It was established under an international agreement commonly referred to as the ICSID Convention, which entered into force on October 14, 1966.[166] At present count more than 140 countries—known as "Contracting States"—adhere to the ICSID Convention.

ICSID's jurisdiction extends to "any legal dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State, which the parties to the dispute consent in writing to submit to" ICSID.[167] Such disputes can include those relating to alleged breaches of investment agreements between an investor and a Contracting State, or those relating to alleged breaches of national investment laws or investment treaties.

In recent years, ICSID's caseload had grown dramatically, especially its docket of investment treaty arbitrations. This growth is attributable to the rapid spread of investment treaties, an increasing awareness on the part of investors of the benefits and protections offered by these treaties,[168] and ICSID's unique enforcement mechanism, which makes many investors prefer ICSID to alternatives that might be available for hearing disputes under such treaties.

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165. *See Yusuf Ahmed Alghanim & Sons*, 126 F.3d at 24 (quoting Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986)).

166. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

167. *Id.* art. 25(1).

168. These typically include, *inter alia*, undertakings by the host State to treat covered investments fairly and equitably, to treat them no less favorably than investments of nationals of the host State or third countries, to refrain from committing expropriations without payment of prompt, adequate, and effective compensation, and to observe any obligations entered into with regard to investments. Investment treaties generally also authorize investors to bring claims against the host State before ICSID (or other specified forums) for perceived treaty breaches.

a. ICSID's Unique Enforcement Mechanism

The ICSID Convention's enforcement mechanism is set forth in its Articles 53 and 54. Article 53(1) provides: "The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award . . . ."[169] While the ICSID Convention does provide an internal review mechanism, whereby a party may have an ICSID award reviewed and potentially annulled by a panel known as an *ad hoc* committee, the grounds for annulment are very narrow.[170] Pursuant to Article 53(1), if an award is upheld during that process, or if no review is sought, there is no basis for a State on the losing end of the award to resist compliance.

In addition, Article 54(1) provides that "[e]ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State."[171] Article 54(2) adds that a party seeking recognition or enforcement in a Contracting State need merely "furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General" of ICSID.[172] Once such a copy has been provided to a competent authority, the award is automatically enforceable against local assets of the debtor State in that country, to the same extent that *any* final local judgment would be enforceable against those assets.[173]

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169. ICSID Convention, *supra* note 166, art. 53(1).

170. The annulment mechanism is outlined in Article 52 of the ICSID Convention. *See id.* art. 52. For commentary on the narrowness of the grounds for annulment set forth in that Article, *see* CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY 892 (2001) ("[A]nnulment is only concerned with the legitimacy of the process of decision: it is not concerned with its substantive correctness."); Eric A. Schwartz, *Finality at What Cost? The Decision of the Ad Hoc Committee in* Wena Hotels v. Egypt, *in* ANNULMENT OF ICSID AWARDS 43, 47–48 (Emmanuel Gaillard & Yas Banifatemi eds., 2004) ("The annulment process is in no sense an appeal of the merits of the tribunal's award. This has been confirmed by all *ad hoc* Committees whose decisions have been published . . . .").

171. ICSID Convention, *supra* note 166, art. 54(1). It bears noting that there are certain disputes heard under the auspices of ICSID that are not covered by this recognition mechanism, namely those arising from arbitrations conducted under the "ICSID Additional Facility Rules." Court recognition of ICSID Additional Facility awards must be pursued in the same manner that one would pursue recognition of any other arbitral award, typically pursuant to the New York Convention.

172. *Id.* art. 54(2).

173. In the United States, this aspect of the ICSID Convention is implemented by 22 U.S.C. § 1650(a), which provides that an ICSID award "shall create a right arising under a treaty of the United States," and that "[t]he pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final

States are not permitted to invoke immunity from jurisdiction in connection with the recognition of an adverse ICSID award, or to raise any other objections to recognition.[174]

The foregoing enforcement mechanism can be a tremendous benefit to a creditor. Recognition proceedings can be time-consuming and expensive, and there is no guarantee that, at the end of the day, recognition will be granted in any particular country. So the opportunity to proceed straightaway to an enforceable judgment in the more than 140 countries that adhere to the ICSID Convention represents a major potential advantage. This enforcement mechanism is not without its limitations, however.

First, Article 54 does not eliminate the possibility that the country where enforcement is sought may recognize circumstances under which courts may refuse to enforce final judgments. In the United States, for example, Rule 60(b) of the Federal Rules of Civil Procedure provides that federal courts may refuse to enforce a final judgment on grounds including: "mistake, inadvertence, surprise, or excusable neglect;" "newly discovered evidence," which by due diligence "could not have been discovered in time to move for a new trial;" or "fraud . . ., misrepresentation, or [other] misconduct by an opposing party."[175] These grounds are construed narrowly, and it is rare for a final judgment to be overturned in the United States, but a State could invoke these grounds in an attempt to avoid enforcement of an ICSID award.[176]

Second, Article 55 of the ICSID Convention provides that "[n]othing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution."[177]

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judgment of a court of general jurisdiction of one of the several States." *See* 22 U.S.C. § 1650(a) (2006). Section 1650(b) also gives U.S. federal district courts exclusive jurisdiction over proceedings relating to ICSID awards. *See id.* § 1650(b).

174. *See* Edward Baldwin, Mark Kantor & Michael Nolan, *Limits to Enforcement of ICSID Awards*, 23 J. INT'L ARB. 1, 2–3, 6–7 (2006) (noting that "[t]o date, there have been no successful judicial challenges to the enforcement of ICSID awards" and surveying French and U.S. cases in which courts have held consistently that sovereigns are precluded from invoking immunity to avoid the recognition of an ICSID award); *see also* Giuliana Canè, *The Enforcement of ICSID Awards: Revolutionary or Ineffective?*, 15 AM. REV. INT'L ARB. 439, 451 (2004); Emmanuel Gaillard, *The Enforcement of ICSID Awards in France: The Decision of the Paris Court of Appeal in the SOABI Case*, 5 ICSID REV. FOREIGN INV. L.J. 69, 71 (1990).

175. FED. R. CIV. P. 60(b).

176. This hypothetical possibility is discussed in Baldwin, Kanter & Nolan, *supra* note 174, at 8–10 (noting that similar such grounds are recognized under the laws of several other countries).

177. ICSID Convention, *supra* note 166, art. 55.

In other words, although the award is enforceable, the State may still be able to invoke immunity with respect to particular assets.[178]

Despite these limitations, ICSID awards hold considerable attractiveness. Historically, most such awards have been voluntarily satisfied, thus making enforcement unnecessary.[179] This may be due in part to ICSID's affiliation with the World Bank, and the possibility that a State that flouts an ICSID award will be denied funding from that body in the future.[180]

b. Threats to the Viability of the ICSID System

In recent years, ICSID and the ICSID Convention have increasingly become targets of criticism by countries facing liability under ICSID awards, who have accused ICSID of being biased in favor of investors, and have described the Convention as a threat to their sovereignty.

The first widely reported comments along these lines were made by officials of Argentina, which has seen numerous claims before ICSID for alleged breaches of bilateral investment treaties in connection with the Argentine financial crisis.[181] Argentine officials suggested that compliance with Article 54 of the ICSID Convention might conflict with Argentine sovereignty or the Argentine Constitution and intimated that Argentine courts might refuse to recognize ICSID awards against the country.[182] Argentina later appeared to modify its position, when its Attorney General made a written undertaking in one arbitration proceeding that Argentina

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178. Only one ICSID award has been the subject of judicial proceedings in the United States. In that matter, the district courts held that the award was enforceable, but that the particular assets the claimant had sought to attach were protected by diplomatic immunity. *See* Liberian E. Timber Corp. v. Gov't of Republic of Liberia, 659 F. Supp. 606, 606, 609–611 (D.D.C. 1987); Liberian E. Timber Corp. v. Gov't of Republic of Liberia, 650 F. Supp. 73, 77–78 (S.D.N.Y. 1986). Similar holdings have been rendered in cases seeking to enforce ICSID awards in France and the United Kingdom. *See* AIG Capital Partners, Inc. v. Republic of Kazakhstan, [2005] EWHC (Comm) 2239, [90]-[95] (Eng.); NIGEL BLACKABY, JAN PAULSSON & LUCY REED, GUIDE TO ICSID ARBITRATION 107–109 (2004).

179. *See* Baldwin, Kantor & Nolan, *supra* note 174, at 4–5 (noting that only four ICSID awards have been the subject of enforcement proceedings in national courts).

180. There is debate over whether this is a real risk, but it is frequently cited as a consideration that States must bear in mind when deciding how to react to an ICSID award. *See, e.g.*, Mark Kantor, *Nationality and Control Issues Involving Financing Parties in ICSID Arbitrations*, *in* ADR & THE LAW 384, 385 (18th ed. 2004).

181. *See* Osvaldo J. Marzorati, *Arbitration Under the 1965 Washington Treaty: Thoughts on the Scope of Protection Under Investment Treaties with Argentina*, 6 BUS. L. INT'L 201, 210 (2005); Michael Casey, *Argentina Justice Min Seeks to Declaw World Bk Tribunal*, DOW JONES NEWSWIRES, Apr. 12, 2005.

182. *See* Casey, *supra* note 181.

would give effect to the first ICSID award that had been issued against it, should the award survive annulment review.[183] It remains to be seen, though, whether Argentina will honor that undertaking, and how the country will treat adverse awards in other cases.[184]

In addition, certain other countries—including Venezuela, Bolivia, and Nicaragua—have announced a plan to withdraw from or "denounce" the ICSID Convention, although to date only Bolivia has delivered notice of denunciation to the World Bank.[185] Moreover, Ecuador recently expressed an intention to limit the nature of the disputes that it would agree to submit to ICSID jurisdiction, excluding, in particular, disputes relating to mining and hydrocarbons.[186]

Yet even if some Contracting States do repudiate or seek to limit the application of the ICSID Convention, ICSID awards should continue to enjoy substantial advantages relative to other types of awards and judgments, at least as a general matter.

2. Recognition and Enforcement of Foreign Court Judgments

There is no international convention governing recognition and enforcement of foreign court judgments comparable to those governing arbitral awards. Certain international agreements on the subject do exist—including the Brussels Regulation that applies to members of the European Union,[187] and various bilateral treaties—but none of these has a membership approaching that of the New York Convention. And while many countries do have some framework for

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183. *See* CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Decision on Argentine Republic's Request for a Continued Stay of Enforcement of the Award, ¶ 28 (Sept. 1, 2006), *available at* http://ita.law.uvic.ca/documents/CMS-StayDecision.pdf.

184. The *ad-hoc* committee ultimately upheld the dispositive aspects of the award, but Argentina has not yet satisfied the award. *See* Luke Eric Peterson, *CMS Energy Urges Argentina to Pay ICSID Award*, INV. TREATY NEWS, Jan. 11, 2008, *available at* www.iisd.org/pdf/2008/itn_jan11_2008.pdf.

185. *See* Fernando Mantilla-Serrano, *The Effect of Bolivia's Withdrawal from the Washington Convention: Is BIT-Based ICSID Jurisdiction Foreclosed?*, 22-8 MEALEY'S INT'L ARB. REP. 21 (2007).

186. *See* Int'l Centre for Settlement of Inv. Disputes, Ecuador's Notification Under Article 25(4) of the ICSID Convention (Dec. 5, 2007), http://icsid.worldbank.org/ICSID/ (follow "Ecuador's Notification under Article 25(4) of the ICSID Convention" hyperlink under "Announcements") (includes hyperlinked notification received from the Republic of Ecuador).

187. *See* Council Regulation 44/2001, Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, arts. 5, 16, 2001 O.J. (L 12) 1 (EC).

domesticating foreign judgments not covered by any treaty (a process oftentimes referred to as *exequatur*), the standards involved vary greatly from country to country.

a. The U.S. Framework

The United States is not currently a member of any convention on the recognition and enforcement of foreign court judgments, but courts in the United States generally have no hesitation giving effect to a foreign court judgment, so long as certain conditions are satisfied. As a threshold matter, the court must have subject matter jurisdiction, and—in the view of some courts—must also have personal jurisdiction over the respondent.[188] If a court concludes that these jurisdictional prerequisites are met, it should proceed to apply the framework for recognition and enforcement of foreign judgments under the law of the relevant U.S. state where the proceedings are brought.

i. Subject Matter Jurisdiction

As discussed above, a U.S. court's subject matter jurisdiction analysis in a proceeding against a foreign sovereign is governed by the FSIA.[189] While the exceptions to jurisdictional immunity include an exception that covers proceedings to enforce foreign arbitral awards, there is no similar exception relating to foreign court judgments. Consequently, a creditor seeking to enforce a foreign court judgment must satisfy some other exception to immunity.

One of these exceptions is the "waiver" exception of § 1605(a)(1), which provides that jurisdiction exists where the state has made an explicit or implicit waiver of immunity from jurisdiction.[190] An explicit waiver typically consists of a contractual provision in which the sovereign agrees to submit to jurisdiction in the

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188. Part II.D.1.b., *supra*, discussed how the personal jurisdiction analysis can play out in the context of proceedings to confirm a foreign arbitral award against a sovereign. The personal jurisdiction analysis should be no different in a proceeding on a foreign court judgment, so the considerations relevant to such an analysis do not bear repeating here. In contrast, a subject matter jurisdiction analysis *is* different in these two contexts, and so will be discussed below.

189. *See supra* Part II.C.1.a.

190. *See* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605(a)(1) (2006).

forum.[191] A waiver may be implied where, for example, the state has filed a responsive pleading that fails to raise the defense of immunity.[192]

Another exception is the "commercial activity" exception of § 1605(a)(2), which has three basic elements.[193] First, the foreign state must have engaged in some "commercial activity" within the meaning of the FSIA. Second, the commercial activity must either have been performed in the United States, or have been performed elsewhere, but (a) have caused a direct effect in the United States, or (b) have been connected with an act of the foreign state performed in the United States. Third, the claim must be "based on" the commercial activity in question. Courts have struggled with how to apply this third element in a proceeding on a foreign court judgment, but the most common approach seems to be to deem the claim "based on" the relevant commercial activity if the activity was a significant cause of the underlying court judgment.

One such case is *Transatlantic Shiffahrtskontor v. Shanghai Foreign Trade Corp.*[194] In that case, the defendant sovereign argued that the action to recognize and enforce a foreign judgment was "based upon" the judgment itself, rather than the commercial acts of the state that gave rise to it. The Second Circuit rejected this argument, noting that this would preclude the enforcement of *any* foreign judgment against a foreign sovereign under this exception, because the elements of such an action would never be based on the underlying commercial activity.[195] The court concluded that an action to confirm a foreign court judgment is "based upon" the relevant commercial activity if the activity is a "but for" cause of the judgment.[196] Yet the court ultimately held that the exception was not satisfied in this particular case because the activity that gave rise to the judgment lacked a sufficient nexus with the United States.[197]

In another case, *Corzo v. Banco Central de Reserva del Peru*,[198] the plaintiff asserted that the defendant's ownership of assets in the United States was a commercial activity and that the proceeding to reach the assets (via recognition of the foreign judgment) was "based upon" those assets. The Ninth Circuit disagreed, asserting that this would make subject matter jurisdiction automatic whenever a

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191. *See* Gulf Res. Am., Inc. v. Republic of Congo, 370 F.3d 65, 73–74 (D.C. Cir. 2004); Nat'l Union Fire Ins. Co. v. People's Republic of Congo, 729 F. Supp. 936, 940 (S.D.N.Y. 1989).

192. *See* Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239, 243 (2d Cir. 1996) (citing H.R. REP. NO. 94-1487, at 18 (1976)).

193. *See* 28 U.S.C. § 1605(a)(2).

194. *See* Transatlantic Shiffahrtskontor GmbH v. Shanghai Foreign Trade Corp., 204 F.3d 384 (2d Cir. 2000).

195. *See id.* at 389.

196. *See id.* at 390.

197. *See id.* at 390–91.

198. 243 F.3d 519 (9th Cir. 2001).

sovereign has assets in the United States and would "obliterate principles of comity and sovereign immunity."[199] The court added that the relevant activity is that which "gave rise to the present suit," and equated this with the activity that gave rise to the foreign litigation that resulted in the judgment to be enforced.[200] The court went on to hold that the plaintiff had failed to satisfy the exception because the activity that gave rise to the foreign litigation—namely, the defendant's denial of compensation for losses resulting from a currency devaluation—was sovereign in nature.[201]

Similarly, in *Strategic Technologies Pte., Ltd. v. Republic of China (Taiwan)*, the District Court held that a plaintiff seeking to confirm a foreign court judgment against a foreign state instrumentality had failed to establish the "commercial activity" exception to immunity because it had not alleged that the respondent's commercial activity that gave rise to the underlying lawsuit "in any way involved or was connected to the United States."[202]

ii. The "Merits" of the Application

If the foregoing jurisdictional obstacles have been surmounted, the court should proceed to consider the "merits" of the application to confirm the foreign court judgment. In doing so, it will apply the law of the state where the proceedings were brought because the United States is not currently a member of any international agreement governing the enforcement of foreign court judgments,[203] and there is not presently any federal legislation that addresses this subject.[204]

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199. *See id.* at 524.

200. *See id*.

201. *See id.* at 525.

202. No. 05-2311 (RMC), 2007 U.S. Dist. LEXIS 34258, at *14–15 (D.D.C. May 10, 2007).

203. The United States supported an effort to achieve such a convention under the auspices of the Hague Conference on Private International Law, but this effort failed over disagreements concerning the types of awards to be subject to mandatory enforcement. *See* Wolfgang Wurmnest, *Recognition and Enforcement of U.S. Money Judgments in Germany*, 23 BERKELEY J. INT'L L. 175, 177–78 (2005). In addition, the United States has signed a Convention on Choice of Court Agreements intended to govern the enforcement of judgments arising from certain forum selection agreements. It has not yet ratified it though, and the Convention has not entered into force. *See* William J. Woodward, Jr., *Saving the Hague Choice of Court Convention*, 29 U. PA. J. INT'L L. 657, 657 (noting that "only Mexico has ratified the Convention in the more than two years since the Convention was concluded and it seems in danger of dying a slow death for lack of interest.").

204. When talks over a proposed international convention on the enforcement of judgments stalled, the American Law Institute began drafting proposed federal legislation on the subject. *See* Brian Richard Paige, Comment, *Foreign Judgments in American and English Courts: A Comparative Analysis*, 26 SEATTLE U. L. REV. 591, 623–24 (2003). A

Most states have adopted one of two uniform acts drafted by the National Conference of Commissioners on Uniform State Laws, which were promulgated in 1962 and 2005, respectively.[205] Both of these apply to a foreign judgment only to the extent the judgment grants or denies a "sum of money," and both require a court to recognize the judgment unless it finds one of the grounds for non-recognition set forth in the relevant act.[206] Grounds common to both acts include:

- "the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law;"
- "the foreign court did not have personal jurisdiction over the defendant;"[207]

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final draft was approved in 2005. *See* Am. Law Inst., Publications Catalog: Codifications and Studies–Civil Procedure–Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute, http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=82 (last visited Oct. 15, 2008). Congress has not yet adopted this proposal, however.

205. *See* Unif. Law Comm'rs, Summary: Uniform Foreign-Country Money Judgments Recognition Act, http://www.nccusl.org/Update/uniformact_summaries/uniformacts-s-ufcmjra.asp (last visited Oct. 15, 2008) (noting that thirty-two states have enacted the 1962 act, which is known as the "Uniform Foreign Money-Judgments Recognition Act"). The 2005 act, which known as the "Uniform Foreign-Country Judgments Recognition Act," has been enacted by five states to date, and legislation has been introduced in one other to adopt it. *See* Unif. Law Comm'rs, A Few Facts About the Uniform Foreign-Country Money Judgments Recognition Act (2005), http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ufcmjra.asp (last visited Oct. 15, 2008). The Uniform Foreign Money-Judgments Recognition Act has been superseded by the Uniform Foreign-Country Money Judgments Recognition Act in four states. *Compare* Unif. Law Comm'rs, A Few Facts About the Uniform Foreign-Country Money Judgments Recognition Act (2005), http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ufcmjra.asp (last visited Oct. 15, 2008) (listing California, Colorado, Idaho, and Michigan under "State Adoptions"), *with* Unif. Law Comm'rs, A Few Facts About the Uniform Foreign Money-Judgments Recognition Act, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ufmjra.asp (last visited Oct. 15, 2008) (listing California, Colorado, Idaho, and Michigan under "State Adoptions"). *See generally* Uniform Foreign-Country Money Judgments Recognition Act (2005), *available at* http://www.law.upenn.edu/bll/archives/ulc/ufmjra/2005final.pdf; Uniform Foreign Money-Judgments Recognition Act (1962), *available at* http://www.law.upenn.edu/bll/archives/ulc/fnact99/1920_69/ufmjra62.pdf.

206. *See* Uniform Foreign-Country Money Judgments Recognition Act §§ 3(a), 4; Uniform Foreign Money-Judgments Recognition Act §§ 1–3.

207. Although section 5 of the 1962 Act identifies circumstances under which the foreign court should be deemed to have personal jurisdiction, and does not state that the

- "the foreign court did not have jurisdiction over the subject matter;"[208]
- "the judgment debtor "did not receive notice of the proceeding in sufficient time;"
- "the judgment was obtained by fraud;"
- "the cause of action "on which the judgment is based is repugnant to the public policy;"
- "the judgment conflicts with another final and conclusive judgment;"
- "the proceeding was contrary to a dispute resolution agreement between the parties; and"
- "in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action."[209]

The 2005 version adds two further grounds:

- "the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment; and"
- "the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law."[210]

In states that have not enacted one of these uniform acts, courts reviewing a petition to recognize a foreign court judgment apply common law, which is generally derived from the U.S. Supreme Court's 1895 decision in *Hilton v.*

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exercise of such jurisdiction must comport with the Due Process Clause, some courts have read this requirement into the law. *See, e.g.*, Pure Fishing, Inc. v. Silver Star Co., 202 F. Supp. 2d 905, 909 (N.D. Iowa 2002); Nippo-Emo Trans Co. v. Emo-Trans, Inc., 744 F. Supp. 1215, 1230 (E.D.N.Y. 1990); Bank of Montreal v. Kough, 430 F. Supp. 1243, 1247 (N.D. Cal. 1977). Nevertheless, as discussed previously, it may not be necessary to make such a showing in a case against a foreign sovereign.

208. In the context of proceedings against a sovereign, some courts have applied the standards of the FSIA when assessing whether or not the foreign court had subject matter jurisdiction. *See, e.g.*, Int'l Hous. Ltd. v. Rafidain Bank Iraq, 893 F.2d 8, 11–12 (2d Cir. 1989).

209. Uniform Foreign-Country Money Judgments Recognition Act § 4(b)–(c) (listing the foregoing grounds for non-recognition); *see* Uniform Foreign Money-Judgments Recognition Act § 4 (also listing the same grounds).

210. Uniform Foreign-Country Money Judgments Recognition Act § 4(c)(7)–(8).

Guyot.[211] In that case, the Court held that the recognition of a foreign money judgment is a matter of comity, and that such a judgment should be recognized if it "appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties," and if the proceedings involved "due allegations and proof[], and opportunity to defend against them," were conducted "according to the course of a civilized jurisprudence, and are stated in a clear and formal record," and were not "affected by fraud or prejudice."[212] The Court added, however, that comity would not require recognition if the courts of the foreign nation do not reciprocally enforce U.S. judgments under similar circumstances.[213] *Hilton* continues to be applied in many states even today, with the exception that its reciprocity requirement has fallen into disfavor in most states.[214]

4. Obtaining Interim Relief in a Domestication Proceeding

Whether the ruling the creditor seeks to domesticate is an arbitral award or a court judgment, it may be prudent for the creditor to seek interim relief while the domestication proceeding is pending. Such relief might include, *inter alia*, an order attaching the sovereign's local assets during the pendency of the proceedings, or an order directing the sovereign to post security for costs.

Pursuant to the FSIA, a U.S. court may grant pre-judgment attachment against a sovereign's assets only if the sovereign has explicitly waived immunity from pre-judgment attachment, and if the purpose of the attachment is to secure satisfaction of a judgment that may be entered.[215] In addition to these requirements, it is generally necessary to satisfy whatever prerequisites for pre-judgment attachment exist under the law of the relevant jurisdiction.[216] The standard varies from jurisdiction to jurisdiction, but, generally, the party seeking the attachment must establish a likelihood of success on the merits of its claims, and must show that the debtor has or is likely to remove, encumber or conceal assets in order to frustrate collection.[217] The court may condition the attachment on the posting of

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211. 159 U.S. 113 (1895).
212. *See id.* at 205–206.
213. *See id.* at 227.
214. *See* Paige, *supra* note 204, at 596.
215. *See* 28 U.S.C. § 1610(d) (2006).
216. State law governing pre-judgment attachment applies even in federal court. *See* FED. R. CIV. P. 64(a) ("At the commencement of and throughout an action, every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment.").
217. *See, e.g.*, N.Y. C.P.L.R. 6201(3), 6212(a) (McKinney 2008).

security to cover damages that could result from the attachment, should it ultimately be determined that the attachment was obtained without a proper basis.[218]

The creditor should also consider seeking an order directing the sovereign to post security for fees and costs likely to be incurred by the creditor in the proceeding. Courts generally have discretion to order the posting of such security,[219] particularly if there is evidence the defendant will refuse to pay these amounts, or will be unable to do so.[220] It bears noting, however, that no federal court of appeals has yet ruled on the propriety of such orders in a case against a sovereign—although some lower courts have ordered sovereigns to post such security.[221]

E. Executing Against Assets of a Sovereign

Once the arbitral award or foreign court judgment has been successfully converted into a local judgment, the creditor generally may proceed with efforts to execute against any non-immune assets of the sovereign located in the forum. The precise steps involved in this process vary from country to country, and even, in some cases, from place to place within a country.

In the United States, the steps involved in executing against a sovereign bear a number of similarities to those applicable in any case. Notably, the FSIA provides that a sovereign not protected by immunity "shall be liable in the same

218. *See, e.g.*, *id.* 6212(b).

219. In the Southern District of New York, for example, Local Civil Rule 54.2 provides that the court, on motion or on its own initiative, "may order any party to file an original bond for costs or additional security for costs in such an amount and so conditioned as it may designate."

220. *See* Selletti v. Carey, 173 F.3d 104, 111–112 (2d Cir. 1999).

221. In one case in which the author's law firm served as counsel, the District Court ordered the Republic of Congo to post security for fees and costs. *See* Kensington Int'l Ltd. v. Republic of Congo, 03 Civ. 4578 (LAP), 2005 U.S. Dist. LEXIS 4331 (S.D.N.Y. Mar. 18, 2005). The Republic appealed from that order, arguing that it violated the FSIA because—according to the Republic—it would have required the Republic to bring immune assets into the forum to post the necessary security. The Second Circuit dismissed the appeal on jurisdictional grounds, without reaching the propriety of the District Court's order. *See* Kensington Int'l Ltd. v. Republic of Congo, 461 F.3d 238, 238–240 (2d Cir. 2006). *See also* Drexel Burnham Lambert Group, Inc. v. Comm. of Receivers for A.W. Galadari, 810 F. Supp. 1375, 1393 (S.D.N.Y. 1993) (denying motions to dismiss by the Emirate of Dubai and a receivers committee, and ordering both to post security for costs), *rev'd on other grounds*, 12 F.3d 317 (2d Cir. 1993), *cert. denied*, 511 U.S. 1069.

manner and to the same extent as a private individual under like circumstances."[222] One difference that does exist, however, is that § 1610(c) provides that attachment or execution against a sovereign may not proceed "until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment . . . ."[223] This is designed to ensure that the sovereign is afforded an opportunity to satisfy the judgment voluntarily.[224]

In applying this provision, courts generally have found that a "reasonable period" can be fairly short.[225] Some courts, though, have interpreted this provision as requiring not only the passage of a period of time, but also that the judgment creditor notify the court of the specific assets against which it seeks to execute, and obtain a determination that such assets are not immune, before restraining them.[226] Other courts, in contrast, have issued orders authorizing enforcement after the passage of a "reasonable period of time," without specific assets having been identified.[227]

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222. 28 U.S.C. § 1606 (2006).

223. *Id.* § 1610(c).

224. *See* Ned Chartering & Trading, Inc. v. Republic of Pak., 130 F. Supp. 2d 64, 67 (D.D.C. 2001) ("According to relevant legislative history, a court's determination of 'reasonable time' should be informed by an examination of the procedures necessary for the foreign state to pay the judgment (such as the passage of legislation), evidence that the foreign state is actively taking steps to pay the judgment, and evidence that the foreign state is attempting to evade payment of the judgment.").

225. *See, e.g.*, *id.* (holding six weeks to be a reasonable period of time); Elliott Assocs., L.P. v. Banco de la Nacion, 96 Civ. 7916 (RWS), 2000 U.S. Dist. LEXIS 14169, at *14–15 (S.D.N.Y. Sept. 29, 2000) (finding ten days to be sufficient); Gadsby & Hannah v. Socialist Republic of Rom., 698 F. Supp. 483, 485–486 (S.D.N.Y. 1988) (considering two months to be sufficient time).

226. *See, e.g.*, Autotech Techs. LP v. Integral Research & Dev. Corp., 499 F.3d 737, 750 (7th Cir. 2007) (holding that the FSIA requires that the judgment creditor identify specific property located in the United States before the court may issue a writ of execution); Conn. Bank of Commerce v. Republic of Congo, 309 F.3d 240, 247 (5th Cir. 2002) (holding that § 1610(c) requires that a court "determine whether the property in question falls within one of the statutory exceptions to foreign sovereign" before issuing a writ of execution); Suraleb, Inc. v. Republic of Belr., 06 C 3496, 2008 U.S. Dist. LEXIS 7354, at *6 (Jan. 31, 2008) (holding that, in a case against a foreign State, the Court "cannot issue a blanket writ for all property located within this district."). FED. R. CIV. P. 69(a) establishes the writ of execution as the procedural mechanism for seizing assets in federal court. State courts likewise employ similar mechanisms.

227. *See, e.g.*, Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co Kommanditgesellschaft v. Republic of Rom., 123 F. Supp. 2d 174, 177–178 (S.D.N.Y. 2004) (noting that "upon determining pursuant to 28 U.S.C. § 1610(c) of the FSIA that a 'reasonable period of time had elapsed following entry of judgment' and that defendants had no meritorious defense, this Court ordered that plaintiff could enforce its judgment against

Under either approach, at some point the sovereign will be given an opportunity to object to the seizure of any particular asset, such as by arguing that the asset does not belong to it, or that the asset is immune. When such an objection is made, the creditor may be granted an opportunity to obtain discovery from the relevant parties to test the basis for the objection.[228] Discovery may also be sought from the judgment debtor, or from third parties, regarding the nature and location of the sovereign's assets, wherever they may be located, to assist in identifying assets in the first place.[229]

Apart from the foregoing complications, execution against a sovereign in the United States generally follows the procedures applicable in cases against private defendants. Whether the proceeding is in state or federal court, the court will apply state rules governing execution.[230] Typically the creditor will register the judgment in every state or federal district where it has located assets pursuant to the

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defendant's property and assets," even though plaintiff had not identified any specific attachable assets in the district).

228. *See, e.g.*, Af-Cap, Inc. v. Republic of Congo, 383 F.3d 361, 366 (5th Cir. 2004) (noting that the district court had ordered discovery to determine whether the property at issue had been used for commercial activity in the United States, and observing that, through such discovery, the creditor "receiv[ed] thousands of pages of responsive documents and depos[ed] numerous witnesses from the Congo, the Garnishees, and non-parties."); Walter Fuller Aircraft Sales, Inc. v. Republic of Phil., 965 F.2d 1375, 1383 (5th Cir. 1992) (remanding with instructions to permit discovery into the relationship between the Republic of the Philippines and a State commission that was alleged to be the Republic's alter ego); Bayer & Willis, Inc. v. Republic of Gam., 283 F. Supp. 2d 1, 7 (D.D.C. 2003) (granting the plaintiff's request to propound interrogatories concerning a Gambian State entity's activities in the United States and its relationship with the Republic of Gambia).

229. *See* First City, Tex.-Houston, N.A. v. Rafidain Bank, 281 F.3d 48, 54 (2d Cir. 2002) (noting that "[d]iscovery of a judgment debtor's assets is conducted routinely under the Federal Rules of Civil Procedure," and that "[a] judgment creditor is entitled to discover the identity and location of any of the judgment debtor's assets, wherever located." (citing FED. R. CIV. P. 69(a) and quoting Nat'l Serv. Indus., Inc. v. Vafla Corp., 694 F.2d 246, 250 (11th Cir. 1982))). *See also* N.Y. C.P.L.R. 5223 (McKinney 2008) (providing that a creditor may compel disclosure of "all matter relevant to the satisfaction of the judgment"); DAVID D. SIEGEL, NEW YORK PRACTICE § 509 (4th ed. 2005) (noting that section 5223 authorizes investigation "through any person shown to have any light to shed on the subject of the judgment debtor's assets or their whereabouts").

230. *See* FED. R. CIV. P. 69 ("[T]he procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable."); *see also* Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 313 F.3d 70, 83 (2d Cir. 2002) ("In attachment actions involving foreign states, federal courts . . . apply Fed. R. Civ. P. 69(a) . . . .").

"Full Faith and Credit" Clause of the U.S. Constitution[231] or its statutory counterpart applicable to federal courts,[232] and courts will proceed to apply their local rules.

Methods of execution vary with the nature of the asset. Generally, once execution has been authorized, the creditor has a writ of execution executed by a United States Marshal or a local official such as a Sheriff.[233] With movable personal property (other than money, which can simply be paid over to the judgment creditor), the relevant official will generally sell the asset at public auction.[234] With real property, the official will take steps to establish a lien over the property, and ultimately sell the property at public auction.[235] (The net proceeds from any such sales are paid over to the creditor, after deducting the fees and expenses of the assisting official, applicable taxes, and any sums due to other creditors with a senior interest.[236]) In the case of monetary obligations owed by third parties, the third parties may be directed to make payments to the Marshal or Sheriff (for the benefit of the creditor), rather than to the debtor.[237]

Through such procedures, a creditor can seek to satisfy the judgment, executing against non-immune assets as they are located until the debt has been collected. If the sovereign's assets are not concentrated in one place, it may be necessary to pursue execution in multiple states within the United States, or even in multiple countries, assuming the creditor has been fortunate enough to locate attachable assets.

F. The Importance and Limitations of Advance Planning

As the foregoing discussion indicates, successful enforcement efforts depend on a number of factors. The outcome may depend, for example, on whether the creditor's contract with the sovereign (if there was a contract) included adequate waivers of immunity. It may also depend on the nature of the ruling the creditor

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231. *See* U.S. Const. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.").

232. *See* 28 U.S.C. § 1738 (2006) (extending to federal courts the requirements of the Full Faith and Credit Clause); *id.* § 1963 (providing that a judgment entered by one federal district court may be registered in others after becoming final, or for good cause shown, and that "[a] judgment so registered shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner.").

233. *See* 28 U.S.C. § 566(c).

234. *See* N.Y. C.P.L.R. 5232–33.

235. *See id.* 5235–5236; SIEGEL, *supra* note 229, §§ 499–500.

236. *See* N.Y. C.P.L.R. 5234.

237. *See, e.g.*, *id.* 5209, 5222(b). Garnishment proceedings are governed by state law, even in federal court, to the extent state law does not conflict with federal law. *See* FG Hemisphere Assocs., LLC v. Republique du Congo, 455 F.3d 575, 595 (5th Cir. 2006).

seeks to enforce, or the locations where the sovereign's assets are located, and how the assets are held. The creditor may be able to shift some of these factors in its favor through careful advance planning, such as by insisting on appropriate waivers when negotiating a contract with a sovereign, providing for arbitration of contractual disputes in a neutral forum, and structuring the investment through a country that has an investment treaty with the host State. This is not always possible, however. A tort victim generally has no opportunity to obtain contractual concessions from the tortfeasor, and his claims are unlikely to be covered by an investment treaty that will provide access to arbitration. And a private party cannot control the uses to which a sovereign dedicates its assets, or the locations in which the sovereign holds them. As a result, under the current framework, individual creditors' prospects for successful enforcement tend to be decidedly uneven from case to case.

III. POLICY CONSIDERATIONS AND REFORM PROPOSALS

Having completed the foregoing examination of the current legal framework for enforcing an award or judgment against a sovereign, the following sections consider where that framework came from, why it is structured the way it is, and how it could be improved.

A. Historical Background

Historically, sovereigns and their property enjoyed absolute immunity from suit, attachment, and execution in most countries, absent their consent. In the United States, this "absolute theory" of immunity was established in *Schooner Exchange v. McFadden*,[238] which involved an effort by U.S. plaintiffs to attach an armed schooner in possession of agents of Napoleon that had been driven into the port of Philadelphia by a storm. The plaintiffs alleged that the vessel belonged to them, but had been wrongfully seized by the French on the high seas.[239] The Court, in an opinion by Chief Justice Marshall, held that armed public vessels of a foreign State were immune from attachment in a friendly State, asserting that a contrary approach (in the absence of consent by the affected State) would impugn the dignity of foreign sovereigns and discourage "mutual intercourse" and "interchange of good offices" among States.[240]

238. 11 U.S. 116 (1812).
239. *See id.* at 119.
240. *See id.* at 137.

The absolute theory prevailed in most countries until relatively recently, including in cases involving commercial property of foreign sovereigns.[241] By the middle of the twentieth century, however, many States had acquired large merchant fleets that were contracting with private parties, and others were routinely entering into oil concessions or similar agreements with foreign investors. Such private parties were often without an effective avenue for pursuing claims when disputes arose from those relationships, and many courts and commentators came to the conclusion that it was no longer tenable to confer absolute immunity on States, and began to advocate a "restrictive" theory of immunity.[242]

In light of these concerns, in 1952 the U.S. State Department issued what became known as the "Tate Letter"—named after its author, Jack B. Tate, a State Department legal advisor—which endorsed a restrictive approach to immunity.[243] The Tate Letter asserted that sovereigns should enjoy immunity for sovereign or public acts (*jure imperii*), but not for commercial or private ones (*juri gestionis*).[244] U.S. courts thereafter endeavored to follow that approach, but only with respect to immunity from *suit*; they continued to afford sovereigns absolute immunity from *attachment and execution*, absent their consent.[245]

It was not until 1976, when the U.S. Congress enacted the FSIA, that certain limitations on sovereign immunity from attachment and execution were established.[246] Although some minor amendments to the statute have been made in the years since then (such as the addition of the "terrorist act" exception to § 1610(a)), the basic framework established in 1976 remains in place. This includes the threshold commercial activity requirement, the waiver exception, and the special protections accorded to diplomatic, central banking, and military property.

Many other countries similarly abandoned the absolute theory at some point during the Twentieth Century, and many now recognize some sort of commercial property and waiver exceptions, and provide special protections to

241. *See, e.g.*, Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562 (1926) (holding that a state-owned commercial vessel was immune from the jurisdiction of U.S. courts, and hence from attachment and execution).

242. One of the seminal such decisions was *Dralle v. Republic of Czechoslovakia*, *translated in* 17 INT'L L. REP. 155 (1950). For an overview of the approaches taken by various countries around the world at mid-century, see Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952), *reprinted in* 26 DEP'T ST. BULL. 984–985 (1952), *and in* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711–715 app. 2 (1976) [hereinafter Tate Letter] (noting that the restrictive theory then held sway in Belgium, Italy, Egypt, Switzerland, France, Austria, Greece, Romania, Peru, and Denmark, and that only the United States, the United Kingdom, and the Soviet Union and its satellites continued to adhere to the absolute theory).

243. *See* Tate Letter, *supra* note 242.

244. *See id.*

245. *See* Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 486 (1983).

246. *See supra* Part II.1.a.

certain types of property. This is the case in the United Kingdom and France, for example, as discussed previously *supra* Part II.C.2-3.

B. Policy Rationales for the Current Approach to Sovereign Immunity

The restrictive theory of sovereign immunity is premised on the notion that it would be unfair if there were no circumstances under which aliens would have an opportunity to pursue redress against sovereigns that have committed wrongs against them, in an age where sovereigns are frequently entering into transactions with aliens and incurring obligations to them.[247] If aliens had no such opportunity, sovereigns could behave with impunity, and would not have to answer for their conduct except in those rare instances when an alien's home country took up his cause. Nevertheless, the current approach to immunity recognizes only certain specific exceptions to immunity, which are often difficult to satisfy. This means that the interests of private parties are often being trumped by other considerations.

As will be seen below, the elements of modern sovereign immunity law result from a perception that enforcement measures against a sovereign have the potential to interfere with the debtor's governmental functions, unsettle diplomatic relations, and trigger retaliatory seizures, and they are designed to avoid such potentialities. Yet the current parameters of the doctrine have not been optimally calibrated to balance the relevant policy considerations. As a result, certain property is now granted immunity even though its seizure by a creditor would not be likely to result in the adverse consequences that the elements of the doctrine are designed to avoid.

1. The Commercial Activity Exception

Advocates of the restrictive theory argue that a sovereign should be subject to jurisdiction, to the same extent that a private or commercial actor would be, with respect to claims arising from commercial activities. As one commentator has put it, "by descending to the level of a commercial actor, a foreign government divests itself of its sovereign status. In other words, when a foreign sovereign engages in commercial activity, that foreign sovereign is no longer acting in a sovereign capacity. The foreign sovereign sheds its sovereignty . . . ."[248]

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247. *See* Tate Letter, *supra* note 242.

248. Clinton L. Narver, *Putting the "Sovereign" Back in the Foreign Sovereign Immunities Act: The Case for a Time of Filing Test for Agency or Instrumentality Status*, 19 B.U. INT'L L.J. 163, 197 (2001) (footnote omitted).

Once a country's courts or legislature have made the decision to permit the adjudication of claims against sovereigns arising from commercial activities, they often consider it a logical next step to permit creditors to enforce any resulting judgments against the assets associated with those activities.[249] The reasoning may be that while a State's public may derive some benefit from the State's commercial activities, this is no different from the profits shareholders derive from the activities of corporations in which they have invested. And since we do not preclude creditors from seizing assets of a privately owned corporation to avoid losses by its shareholders, we should not prevent creditors from reaching State assets associated with a commercial activity. In contrast, if a creditor were allowed to seize property in use for a sovereign activity—such as diplomatic assets or military property—this could prevent the State from providing its people with services or protections that only the State can provide.

It is sometimes also said that if the courts of one State were to seize the property of another used for sovereign activities, this would be more likely to create foreign policy friction, and to trigger retaliatory seizures.[250] This is presumably predicated on the perceived greater importance of sovereign activities to the debtor State and its public.

One could quibble with these policy rationales by pointing out that sovereign activities are not always beneficial to a State's public (such as the operations of an oversized or oppressive military), and that commercial activities are sometimes highly beneficial to a State's public (where the fruits of those activities are shared equitably, rather than being siphoned off by a ruling elite). It would not be practicable or advisable, though, to place the courts of one country in the position of assessing the value or efficiency of another's sovereign activities.

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249. Since countries began embracing the restrictive theory of sovereign immunity, they have often limited execution (in the absence of waiver) to property associated with activities that could give rise to jurisdiction, such as property associated with commercial activities. *See* James Crawford, *Execution of Judgments and Foreign Sovereign Immunity*, 75 AM. J. INT'L L. 820, 862 (1981) (pointing out that it is common for countries to preclude execution of "state property or funds set aside for purposes that would be immune from jurisdiction (if a dispute arose concerning the use of the property or funds for those purposes)," but to permit execution against property set aside for commercial activities).

250. *See* Jeremy Ostrander, Note, *The Last Bastion of Sovereign Immunity: A Comparative Look at Immunity from Execution of Judgments*, 22 BERKELEY J. INT'L L. 541, 546 (2004) (asserting that execution against a State's assets has the potential to upset diplomatic relations, and concerns about retaliatory seizures of assets have led the U.S. government to confer immunity on assets associated with diplomatic activities). *See also* William R. Dorsey, III, *Reflections on the Foreign Sovereign Immunities Act After Twenty Years*, 28 J. MAR. L. & COM. 257, 257 & n.4 (1997) (citing a statement of Elizabeth G. Verville, State Department Deputy Legal Advisor, during the hearings that led to the adoption of the FSIA, noting that one of the principal purposes of sovereign immunity is to avoid tension in international relations).

And sovereigns should not be granted a free pass with respect to commercial property that produces material benefits for their publics.

Nevertheless, the current focus on whether or not property is in use for a commercial activity is not optimal. Rather than having an *exception* that denies immunity to property if it is in use for a commercial activity, there would be advantages to having a *general rule* that makes property of sovereigns available to its creditors, subject to an exception that confers immunity on property in use for a sovereign activity.

Property that is not in use for a sovereign immunity will already be available to creditors in many cases, even under the FSIA as presently formulated. The Supreme Court has indicated that an activity should be considered "commercial" unless it is the type of activity in which *only* a sovereign can engage,[251] which means that if a given item of property is not in use for a sovereign activity, it generally will be deemed in use for a commercial activity, and therefore potentially reachable.[252] Yet, even if that element is established, the court still has to make some additional finding, such as that the debtor State has made a waiver of immunity, or that the property to be seized has a nexus to the underlying claim.[253] If, in contrast, there were a general rule that automatically made property of a sovereign available unless it was in use for a sovereign activity, no such additional finding would be required.

The author submits that there is no good policy reason for a court to make any inquiry beyond establishing whether or not the property is in use for a sovereign activity. If the State is not currently using the property in a sovereign activity, then allowing the State's creditors to reach it to satisfy a valid debt should not unduly interfere with the State's performance of its governmental functions. While such property could potentially be used for sovereign activities *in the future*, that is irrelevant because the same could be said of *any* property of a State. Funds in a bank account that are being used to fund a State's commercial ventures are fungible,

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251. *See* Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614 (1992) ("[A] foreign government's issuance of regulations limiting foreign currency exchange is a sovereign activity, because such authoritative control of commerce cannot be exercised by a private party; whereas a contract to buy army boots or even bullets is a 'commercial' activity, because private companies can similarly use sales contracts to acquire goods."); *see also* Tex. Trading & Milling Corp. v. Fed. Republic of Nigeria, 647 F.2d 300, 309 (2d Cir. 1981) ("[I]f the activity is one in which a private person could engage, it is not entitled to immunity.").

252. It will be recalled that, in cases against foreign States, § 1610(a) imposes the threshold requirement that the property be "in use for a commercial activity in the United States." *See supra* Part II.C.1.a.

253. *See* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1610(a)(1)–(2) (2006). Other available exceptions are set forth in §§ 1610(a)(3)–(7), *amended by* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083(b)(3)(A), 122 Stat. 3, 341.

and could be applied by the State to a sovereign activity at a moment's notice, but that does not stop courts from authorizing the seizure of such funds under the current legal framework.

2. The Waiver Exception

A State's waiver of immunity from execution is essentially advance consent to enforcement. Accordingly, the waiver exception to immunity can be seen as an expression of the general rule that a sovereign (or its property) is immune from jurisdiction (or from attachment and execution) *absent the sovereign's consent*.[254] And while a sovereign could seek to withdraw its consent when the time for enforcement came, this is generally not permitted. Such a result would not be fair to the creditor, given that the waiver of immunity may have induced the creditor to enter into the contract that contained the waiver in the first place.[255]

While this makes sense, the waiver exception—as presently formulated in § 1610(a)(1) of the FSIA—would become superfluous if the recommendation made in Part III.B.1, *supra*, were adopted. This is because this exception does not become relevant until *after* it has been established that the property to be seized is "used for a commercial activity in the United States," whereas, under the above proposal, property of a State would *automatically* be available if it is not in use for a sovereign activity, whether or not a waiver has been made.

3. Special Treatment for Diplomatic, Central Banking, and Military Property

The principal rationale that is typically put forward for the special treatment accorded to diplomatic property is that its seizure would inhibit the conduct of diplomatic relations with the debtor State, which are vital to maintaining international peace and security.[256] In addition, most States have their own

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254. *See* Jing-wei Lu, *Implied or Constructive Waiver? Effect of Participation in Litigation Under the Foreign Sovereign Immunities Act of 1976*, 6 J. INT'L L. & PRAC. 63, 82 & n.147 (1997).

255. This rationale is reflected in the legislative history for the FSIA. *See* H.R. REP. NO. 94-1487, at 18 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6616–6617.

256. As the Paris Court of Appeals has observed, the purpose of the Vienna Convention's protection of diplomatic assets is designed "to ensure the efficient performance of the functions of diplomatic missions as representing States." *See* Cour d'appel [CA] [regional court of appeal] Paris, 1re ch. A, Aug. 10, 2000, *reprinted in* 15 MEALEY'S INT'L

diplomatic missions around the world, which gives them an incentive to hold diplomatic missions of other States inviolate on a reciprocal basis. It is not surprising, therefore, that diplomatic assets tend to be accorded special treatment.

As for central banking assets, the FSIA's legislative history indicates that Congress conferred special protection on such property to encourage foreign governments to maintain foreign currency reserves in the United States, as well as to avoid tension with other countries that could result from large seizures of central bank assets.[257] The former goal reflects a perceived benefit to the United States' economy and balance of payments from central banking deposits of foreign governments, while the latter is premised on the notion that States place particular importance on their foreign reserves, as compared to other assets.[258]

Whether or not these premises are valid, it is clear no purpose would be served by granting special protection to assets simply because they were held by a central bank. Were such assets automatically protected—without any requirement that they be in use for central banking activities—States could use central banks to shield assets from their creditors. The FSIA seeks to address this concern by extending the protections of § 1611(b) to property held by a central bank for its own account.[259]

As for military property, one need only imagine a county Sheriff attempting to seize a warship or tank in the possession of a foreign military to understand why such property is normally treated as off-limits from execution. Nevertheless, there are some instances in which military property *should* be available to creditors, namely where it is not in use or intended for use for a military activity by the debtor State, and is not in the possession of a military authority. (This might be the case if, for example, the State has earmarked the property for sale to a third party.) This distinction is currently reflected in § 1611(b).[260]

ARB. REP. A-3 (2000). That court called the performance of these functions "an essential attribute of the sovereignty of States" that is vital to international relations.

257. *See* H.R. REP. NO. 94-1487, at 31 (asserting that if there were no special protections for central bank assets, then "deposit of foreign funds in the United States might be discouraged" and "execution against the reserves of foreign states could cause significant foreign relations problems.").

258. It has been argued that a major flight of foreign reserves by central banks would adversely affect the United States' balance of payments. *See* Ernest T. Patrikis, *Foreign Central Bank Property: Immunity from Attachment in the United States*, 1982 U. ILL. L. REV. 265, 266 (1982).

259. *See* 28 U.S.C. § 1611(b)(1) (2006).

260. *See id.* § 1611(b)(2) (conferring immunity on property that "is, or is intended to be, used in connection with a military activity and (A) is of a military character, or (B) is under the control of a military authority or defense agency.").

C. Reform Proposals

The preceding section argued that the legal framework for enforcing awards and judgments against sovereigns should be simplified in such a way that property of a sovereign would be automatically available to its creditors to satisfy valid debts, unless the property is in use for a sovereign activity.[261] The sections that follow will consider the amendments to the FSIA that would be required to implement this proposal in the United States, and outlines certain additional reforms that should be considered at the international level.

1. Author's Proposed Amendments to §§ 1609-1611 of the FSIA

The specific language that the author would propose for §§ 1609-1611 is set forth in the Appendix to this article. Notably, § 1609 would need to be amended to provide that property of a foreign sovereign is immune *only* in the circumstances set forth in §§ 1610 and 1611, subject to any other commitments that the United States may have under international agreements. This would require only one simple edit: the substitution of the word "only" for the word "except."

In addition, § 1610(a) would need to be amended to eliminate the threshold commercial activity requirement, and replace it with a sovereign activity exception to the general rule of non-immunity. This amended provision would apply to both states and their agencies and instrumentalities. Once this modification had been made, all of the current further requirements or "exceptions" of § 1610(a) would become moot, as would § 1610(b).

Certain of the remaining subsections of § 1610 would continue to be relevant, and should be preserved, but would need to be renumbered. Moreover, some modification of the provision on pre-judgment attachment (currently found in § 1610(d)) would be required to reflect the new focus on whether or not the property is associated with a sovereign activity.

Section 1611, in turn, would benefit from the addition of a clause that refers explicitly to diplomatic property as a category of property that is accorded special protection. This is consistent with a proposal made previously by a committee of the American Bar Association (which is discussed in greater detail in

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261. This rule should apply equally whether the debtor is a state or a state agency or instrumentality. States may choose to have certain sovereign activities performed by an agency or instrumentality, but the character of the activity is not affected by the identity of the entity performing it. Conversely, all property of an agency or instrumentality *not* associated with a sovereign activity should be reachable by creditors. This is the approach embraced by the UN Convention, which, as previously noted, provides that a State entity is entitled to immunity only to the extent it is engaged in sovereign activities. *See supra* Part II.C.4.

the following section). Although diplomatic property is separately protected under U.S. law, it would be appropriate, for the sake of good order, to have all of the various special categories of property listed in one place.

If the foregoing amendments were adopted, they would significantly enhance a creditor's prospects for collecting from a sovereign in many cases.

First, the amendments to §§ 1609 and 1610 would invert the general rule so that property of a foreign sovereign in the United States would be presumptively available to its creditors (i.e., not entitled to immunity), unless the sovereign could establish grounds for treating the same as immune. This would be fitting, as the sovereign is in the best position to present evidence on the nature of its assets and the manner in which they have been employed, and the sovereign should not have difficulty establishing the basis for their immunity if they are truly deserving of protection (as in the case of, for example, embassy buildings and military property).[262]

Second, it would no longer be necessary to show that a given asset is used for a commercial activity, let alone such an activity in the United States or the very activity on which the claim is based. If a debtor state could not establish that a local asset was in use for a sovereign activity (or that it otherwise is covered by a special carve-out), it would be reachable. While it may be appropriate to consider whether or not a state has engaged in activity in the United States at the *jurisdictional* stage—given that a FSIA subject matter jurisdiction analysis to some extent serves as a role similar to a "minimum contacts" due process analysis[263]—that connection will already have been established by the time execution is sought. The mere fact that the property is located in the enforcing country should be enough to warrant making enforcement mechanisms available to the creditor (provided, of course, that the other prerequisites for attachment and execution are met). The elimination of the need to establish a nexus between the property and the underlying claim (which presently applies under the FSIA in cases against foreign states in the absence of an immunity waiver) would be of particular benefit to creditors, as it frequently represents a significant obstacle to collection.[264]

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262. The sovereign has the ultimate burden of persuasion in the United States even under existing law. *See* Cargill Int'l S.A. v. M/T Pavel Dybenko, 991 F.2d 1012, 1016 (2d Cir. 1993) ("[T]he plaintiff has the burden of going forward with showing that, under exceptions to the FSIA, immunity should not be granted, although the ultimate burden of persuasion remains with the alleged foreign sovereign." (citation omitted)).

263. *See supra* Part II.D.1.b. This is not intended to suggest that a connection between the sovereign's conduct and the United States should be required with *every* type of claim. A proceeding brought on a foreign court judgment or arbitral award should not require any such nexus, because it does not seek the adjudication of a dispute on the merits, but merely to enforce the ruling against local assets.

264. *See* Working Group of the ABA, *Report: Reforming the Foreign Sovereign Immunities Act*, 40 COLUM. J. TRANSNAT'L L. 489, 585 (2002) [hereinafter ABA Report]

Third, tort victims would at last have a viable chance of collecting from sovereign tortfeasors. Although there are provisions under the current FSIA to facilitate collection by victims of terrorist acts and specified similar wrongs, other tort victims are generally without recourse when it comes to pursuing enforcement. They rarely have contractual privity with the sovereign tortfeasor, and thus do not benefit from a contractual waiver. Moreover, tort claims often do not arise from commercial activity, and so the commercial activity exception is rarely applicable. This means that most tort victims are currently limited to recovering "insurance proceeds" under § 1610(a)(5), if any are available. This is one of the glaring defects of the FSIA as presently drafted.

2. The American Bar Association's Proposed Amendments

The author is by no means the first to propose amendments to the current version of the FSIA's provisions on attachment and execution. Other proposals have been put forward over the years, the most comprehensive being a 2002 report by a Working Group of the American Bar Association ("ABA Report").[265]

The ABA Report described the FSIA's provisions on attachment and execution as "among the most confusing and ineffectual in the statute," and noted that they create an "extremely restrictive regime" that makes it very difficult for creditors to collect from sovereigns in the United States.[266] The ABA Report went on to recommend a number of significant revisions to the statute, including a dramatic simplification of § 1610. The Report would leave in place the threshold commercial activity requirement, as well as the waiver exception, but would eliminate all of the other exceptions of the present § 1610(a), and replace them with a broad exception denying immunity to property of a foreign state where "[t]he judgment relates to a claim for which the foreign state is not immune under section 1605."[267] In other words, once a creditor has succeeded in obtaining jurisdiction against the sovereign, and the creditor has obtained a judgment in its favor, it could reach any property of the foreign State that was in use for a commercial activity in the United States, unless it was protected by § 1611.

(asserting that "[o]nly in rare instances would a foreign state have property in the United States, perhaps an office, warehouse, or goods awaiting export, 'used' for the activity giving rise to the claim."); *see also* SCHREUER, *supra* note 170, at 1151–52 ("Some national laws also require that there is a specific link between the underlying claim and the property that is subject to execution. This is another serious limitation on the availability of assets for execution. It is unlikely that a host State will keep commercial assets in another country that can be said to have a direct connection to an investment in its territory.").

265. *See generally* ABA Report, *supra* note 264.

266. *Id*. at 581, 584.

267. *See id*. at 587.

These proposals have merit, and would represent a considerable improvement over the current versions of §§ 1610 and 1611. They do not go far enough, though, because they retain the requirement that the property be "in use for a commercial activity in the United States" (in cases against foreign states) and the general rule of immunity set forth in § 1609.

The ABA Report also recommended modest revisions to § 1611, including the addition of a clause noting that diplomatic property is subject to immunity notwithstanding anything in § 1610.[268]

Despite the merits of the ABA Report, Congress has never acted on its proposals. Although many creditors would benefit from reform of the FSIA, they are a disparate group—comprised of individuals and companies from many different countries, engaged in a wide range of activities, with a motley assortment of claims against a diverse collection of sovereign entities—and have not yet mounted a concerted lobbying effort or united behind any specific proposal. Until that happens, it is unlikely Congress will be stirred to act on any reform initiatives.

3. A Proposed International Convention

All of the putative adverse consequences of judicial enforcement measures against sovereigns would be avoided if there were some alternative mechanism that did not require recourse to such measures. One such alternative would be a mechanism established by international convention whereby a surety or fund would pay amounts due to creditors under awards or judgments against participating States that meet specified criteria.

This mechanism could take various forms. A standing fund could be established, through contributions from participating states, from which eligible debts would be paid. Alternatively, a global insurance policy (or series of individual insurance policies) could be obtained, with the premiums financed collectively by participating states, pursuant to which the insurers would be bound to satisfy covered awards or judgments, either in whole or up to a specified limit.

It is debatable how best to fund such a mechanism. Were market considerations allowed to determine the contributions of participating states, those most likely to incur covered liabilities would be called upon to make the largest contributions. Alternatively, participating states could be called upon to make contributions that were a function of their Gross Domestic Products, or other indicia of their relative abilities to pay—an idea that would no doubt invite objections from wealthier countries.

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268. *See id.* at 588–89. This proposed change to § 1611(b) has been adopted almost verbatim in the suggested amendments to the FSIA set forth in Appendix A to this article.

It would also need to be determined what awards or judgments would be eligible for satisfaction through this mechanism. Eligible awards could include only ICSID awards, in which case the instrument establishing it would logically be an amendment to, or outgrowth of, the ICSID Convention. Alternatively, the mechanism could extend to both ICSID awards and any final judgments rendered by courts in participating states (including any arbitral awards that have been domesticated in a participating state). If the latter approach were adopted, it would be appropriate to establish a framework for the review of any such judgments, so as to confirm that the underlying proceedings met basic international standards of due process and fairness.

Another question is whether limits should be placed on the "coverage" afforded to individual participating states under such a mechanism. In the past, some states have incurred massive liabilities to private parties—as has been the case, for example, with Argentina following the measures it took in the aftermath of its 2001 financial crisis—and liabilities of such a magnitude could put stress on the system. Not only would large liabilities be comparatively difficult to finance, but—if some states incurred liability dramatically in excess of others—free riding problems would result, and could generate resentment and ill will on the part of other states. Moreover, if there were no limits on a country's liability coverage, a country would not have an adequate incentive to keep its debts under control and avoid wrongful conduct.

One possible solution would be to require debtor states to reimburse the common fund for amounts paid out under this mechanism as a result of their liabilities, either all at once or pursuant to a payment plan. Alternatively, such states could be required to pay increased "premiums" to maintain coverage going forward. And a state's refusal to meet such conditions could result in its denial of access to funding from the World Bank, International Monetary Fund, or other multilateral or governmental sources in the future. Furthermore, diplomatic pressure could be placed on non-compliant states by other states to observe their commitments. For obvious reasons, the community of nations is in a better position to influence the behavior of its members than are private creditors.

The question arises whether states would be willing to agree to such a mechanism. At least in the short term, they almost certainly would not. Most states no doubt consider themselves better off under the present framework, which allows them to deal with aliens on an *ad hoc* basis, and often permits them to escape their obligations. In the long run, however, states may realize that it is in no one's interest to retain the current dysfunctional system, and that they would benefit from the proposed alternative framework in a number of ways.

To begin with, it should be possible to structure this framework so that part of any given liability that a participating state might incur would be shifted to other participating States or third parties, such as the insurers who might agree to underwrite the mechanism.

In addition, this alternative framework would likely stimulate investment flows, because foreign investors would have greater confidence that they would be made whole if they suffer losses from wrongful conduct of host states, which should make them more inclined to undertake investments. This, in turn, should boost host states' economies, contributing to their prosperity and boosting their tax revenues. Moreover, states would find their courts relieved of the obligation to devote resources to adjudicating petitions to enforce awards and judgments against other states.

Finally, removing from States the responsibility of taking enforcement measures would avoid the potential adverse consequences associated with such measures. At the same time, the proposed framework would take away the advantages that states may seek to gain by *refusing* to take such measures. Specifically, states may believe that making it difficult or impossible for creditors to enforce rulings against sovereigns helps them cultivate a reputation as a secure place for sovereigns to invest their capital, thereby attracting investment. In this sense states now face a form of the classic "Prisoner's Dilemma" of game theory when formulating their approach to sovereign immunity.[269] If one state pursues a perceived incentive to attract investment by severely limiting enforcement measures against sovereigns, while other states give creditors a more viable opportunity to collect, the former state may achieve its desired result. Yet, if all states pursue that incentive simultaneously, then no state achieves the desired windfall, as is presently the case. In contrast, if states acted together by enacting an international convention along the lines discussed above, they could achieve a fairer and more uniform enforcement framework, which would, arguably, bring with it a number of benefits of its own, thereby enhancing these states' collective utility.[270]

IV. CONCLUSION

With the spread of globalization, a much broader range of persons is now interacting with foreign governments and their instrumentalities, and lawsuits or arbitrations between private parties and sovereigns are now common. Yet few claimants who obtain court judgments or arbitral awards against sovereigns ever succeed in enforcing them. The current framework for enforcing rulings against sovereigns is exceedingly difficult to navigate, and creditors' prospects for success vary dramatically from case to case.

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269. For an explanation of the Prisoner's Dilemma, *see* ROGER B. MYERSON, GAME THEORY: ANALYSIS OF CONFLICT 97 (1997).

270. *See generally id.* at 370–371 (explaining the phenomenon of "collective transformation," where players use agreements and other cooperative strategies to transform a game with dismal equilibria—such as Prisoner's Dilemma—into one with equilibria, which is better for all of the players).

Although there are valid reasons for limiting judicial enforcement against sovereigns, the current parameters of the doctrine of sovereign immunity would benefit from reform. A few simple adjustments would give many more creditors a viable opportunity to collect on valid debts. In addition, consideration should be given to the possibility of establishing, by international convention, a mechanism whereby eligible debts owed by member states would be automatically satisfied, without the need for recourse to judicial enforcement.

These reforms would be difficult to achieve, and none is likely to be realized in the near term. If adopted, however, these reforms would enhance the collective utility of states around the world and the publics they are intended to serve.

APPENDIX

Proposed Amendments to §§ 1609-11 of the Foreign Sovereign Immunities Act

Section 1609. Availability of property of a foreign state for attachment and execution
Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution only as provided in §§ 1610 and 1611 of this chapter.

Section 1610. Immunity of property of a foreign state from attachment and execution generally
(a) The property in the United States of a foreign state, as defined in § 1603(a) of this chapter, used for a sovereign activity, shall be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act.
(b) No attachment or execution referred to in subsection (a) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under § 1608(e) of this chapter.
(c) The property of a foreign state, as defined in § 1603(a) of this chapter, shall be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, unless--

(1) the property is not in use for a sovereign activity,
(2) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and
(3) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(d) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in § 1605(d).

Section 1611. Certain types of property immune from attachment and execution

(a) Notwithstanding the provisions of § 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of § 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if--

> (1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver;
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> (2) the property is, or is intended to be, used in connection with a military activity and
>
> > (A) is of a military character, or
> >
> > (B) is under the control of a military authority or defense agency; or
>
> (3) the property is protected from execution or attachment by the Vienna Convention on Diplomatic Relations (April 18, 1961, 23 U.S.T. 3227), the Vienna Convention on Consular Relations (April 24, 1963, 21 U.S.T. 77), or any treaty, international convention, or other international agreement, or other federal statute of the United States related to property of foreign states or instrumentalities of foreign states.